Supreme Court, U.S.
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No.

In the Supreme Court of the United States

YUMA ANESTHESIA MEDICAL SERVICES LLC,

Petitioner,

v.

LESTER FLEMING,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an independent contractor may maintain an employment discrimination suit under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794.

RULE 14.1(b) STATEMENT

The parties to the proceeding below were plaintiff-appellant Lester Fleming and defendant-appellees Yuma Regional Medical Center and Yuma Anesthesia Medical Services. Yuma Regional Medical Center is no longer a party to this action.

RULE 29.6 STATEMENT

Petitioner Yuma Anesthesia Medical Services, LLC has no parent corporation, and no publicly held company owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Yuma Anesthesia Medical Services LLC respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a–16a) is reported at 587 F.3d 938. The district court's order (App., *infra*, 17a–19a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 19, 2009. On January 12, 2010, Justice Kennedy extended the time for filing the petition for a writ of certiorari to March 22, 2010. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant portions of the Rehabilitation Act of 1973 (29 U.S.C. §§ 794–794a) and the Americans with Disabilities Act of 1990 (42 U.S.C. §§ 12111–12112) are reproduced in the appendix (App., *infra*, 20a–32a).

STATEMENT

This case involves a recurring issue of national importance that has deeply and openly divided the lower courts. Resolution of the lower court conflict is necessary to define the obligations that recipients of federal funds owe disabled individuals, and the legal standards that govern suits alleging the violation of those obligations.

Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, prohibits recipients of federal funding from

discriminating on the basis of an individual's disability. In general, lawsuits alleging the violation of Section 504 are governed by the standards set forth in Sections 504(a) and 505(a)(2) of the Rehabilitation Act (29 U.S.C. §§ 794(a), 794a(a)(2)) which require that the plaintiff prove that his or her disability was the "sole" cause of the defendant's conduct and that the defendant acted with discriminatory intent. But under Section 504(d) of the Rehabilitation Act (29 U.S.C. § 794(d)), suits alleging "employment discrimination" are governed instead by a different set of standards, namely those set forth in Title I of the Americans with Disabilities Act ("ADA"). Title I of the ADA imposes substantial duties on employers of fifteen or more employees and allows employees of such entities who allege a violation of those duties to prevail even if the employee's disability was simply one "motivating factor" among many for the defendant's conduct and the defendant acted without discriminatory intent.

The lower courts are openly and irreconcilably divided over the extent to which Section 504(d) of the Rehabilitation Act incorporates Title I of the ADA. In the decision below, the Ninth Circuit joined the Tenth Circuit in holding that Section 504(d) incorporates Title I insofar as it defines "the substantive standards for determining *what* conduct violates the Rehabilitation Act" but does not incorporate those aspects of Title I that would "defin[e] * * * *who* is covered under the Rehabilitation Act." App., *infra*, 11a. Thus, under the Ninth and Tenth Circuits' interpretation of Section 504(d), independent contractors and employees of firms with fewer than fifteen employees may bring employment discrimination claims under the Rehabilitation Act—and thus may invoke the substantive standards set forth in Title I

of the ADA—even though Title I, which Section 504(d) incorporates with respect to "complaint[s] alleging employment discrimination," does not cover independent contractors or employees of entities with fewer than fifteen employees.

The Ninth Circuit recognizes that the decision below places it and the Tenth Circuit "in conflict with the Sixth and Eighth Circuits." App., *infra*, 14a. In fact, the decision below is also in conflict with decisions of the D.C. Circuit and the Idaho Supreme Court. In contrast to the Ninth and Tenth Circuits, those courts have held that the Rehabilitation Act does, with respect to employment discrimination claims, incorporate Title I's limitations as to "*who* is covered." *Id.* at 11a. Accordingly, in the Sixth, Eighth, and D.C. Circuits, and in the Idaho state courts, independent contractors—and, by implication, employees of entities with fewer than fifteen employees—may not bring employment discrimination claims under the Rehabilitation Act and may not invoke Title I's substantive standards.

As a result of the conflict in the lower courts, the Rehabilitation Act is applied inconsistently across the country. That inconsistency affects, in the first instance, the substantive obligations imposed on recipients of federal funds. In the Ninth and Tenth Circuits, the duties created by Title I of the ADA—including, for example, the duty to provide part-time or modified work schedules—are owed by all recipients of federal funds, not only those who employ fifteen or more people, and are owed not only to employees, but also to independent contractors. Within the Sixth, Eighth, and D.C. Circuits, recipients of federal funds owe those duties only to their employees, and, presumably, owe those duties only if

they employ more than fifteen people. Given the conflict between the Ninth Circuit and the Idaho Supreme Court on the meaning of Section 504(d), it is unclear what duties are owed to whom by a recipient of federal funds located in Idaho.

The conflict over the meaning of Section 504(d) also affects the legal standards that are applied by courts hearing claims brought under the Rehabilitation Act. In the Ninth and Tenth Circuits, independent contractors and employees of entities with fewer than fifteen employees who bring employment discrimination claims under Section 504 are able to invoke the standards of Title I of the ADA and thus need only prove that their disability was a "motivating factor" in the defendant's conduct and that the defendant's conduct had a discriminatory effect. In the Sixth, Eighth, and D.C. Circuits and in the Idaho state courts, by contrast, independent contractors and, by implication, employees of entities with fewer than fifteen employees cannot invoke Title I and must therefore prove both that their disability was the "sole" cause of the defendant's conduct and that the defendant acted with discriminatory intent.

Which substantive duties are imposed and which legal standards are applied will be outcome determinative in many cases. In this case, the Ninth Circuit held that the respondent, an independent contractor, could bring an employment discrimination claim under Section 504 of the Rehabilitation Act. Had respondent brought suit within the Sixth, Eighth, or D.C. Circuits, or in Idaho state court, his claim would surely have been dismissed.

This Court should put an end to the lower courts' long-standing and ever-deepening division over the proper interpretation of Section 504(d). Because the

facts "are simple and not contested" (App., *infra*, 2a), this case presents an ideal vehicle for resolving that conflict—a conflict that merits this Court's attention because it involves an important and recurring question of federal statutory construction.

A. Statutory Background

1. Section 504 of the Rehabilitation Act provides that "no otherwise qualified individual with a disability * * * shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). Section 505 of the Rehabilitation Act makes "[t]he remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964" available to anyone whose rights under Section 504 have been violated. 29 U.S.C. § 794a(a)(2). Accordingly, Section 504 is enforceable through an implied private right of action. See, *e.g.*, *Fowler* v. *UPMC Shadyside*, 578 F.3d 203, 206 n.2 (3d Cir. 2009) ("Since Congress has incorporated Title VI's remedial scheme into the Rehabilitation Act, plaintiffs alleging violations of Section 504 have a private right of action under federal law.").

Section 504 contemplates two categories of enforcement actions—those "alleging employment discrimination" (29 U.S.C. § 794(d)) and all others.

Complaints that do not allege employment discrimination are governed by the standards set forth in Section 504(a) and those incorporated through Section 505(a)(2), which together set a high bar for recovery. The courts of appeals have strictly construed Section 504(a)'s causation standard, which requires proof that the alleged discrimination oc-

curred "solely by reason of" the plaintiff's alleged disability. 29 U.S.C. § 794(a). As the Eleventh Circuit has explained, Section 504 plaintiffs must show not merely that their disability was a "but for" cause of the alleged discrimination, but that it was in fact the "*sole[]*" cause. *Severino* v. *N. Fort Myers Fire Control Dist.*, 935 F.2d 1179, 1183 (11th Cir. 1991) (emphasis added); see also, *e.g.*,. *Amir* v. *St. Louis Univ.*, 184 F.3d 1017, 1029 n.5 (8th Cir. 1999).

Similarly, because a plaintiff's implied right of action is conferred through incorporation of "[t]he remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964" (29 U.S.C. § 794a(a)(2)), which in turn requires that compensatory damages be supported by proof of discriminatory intent (see *Alexander* v. *Sandoval*, 532 U.S. 275, 281 (2001); *Guardians Ass'n* v. *Civil Serv. Comm'n*, 463 U.S. 582, 584 (1983)), every court of appeals to consider the question has concluded that a plaintiff seeking compensatory damages under Section 504(a) for non-employment discrimination "must prove a *mens rea* of 'intentional discrimination.'" *Mark H.* v. *Lemahieu*, 513 F.3d 922, 938 (9th Cir. 2008) (quoting *Duvall* v. *County of Kitsap*, 260 F.3d 1124, 1138 (9th Cir. 2001)); accord *Powers* v. *MJB Acquisition Corp.*, 184 F.3d 1147, 1153 (10th Cir. 1999) (collecting cases holding the same); *Wood* v. *President & Tr. of Spring Hill College in the City of Mobile*, 978 F.2d 1214, 1219 (11th Cir. 1992).

Complaints that allege employment discrimination, on the other hand, are governed by Section 504(d), which provides that "[t]he standards used to determine whether [Section 504] has been violated in a complaint alleging employment discrimination * * * shall be the standards applied under Title I of

the Americans with Disabilities Act of 1990 * * *, as such sections relate to employment." 29 U.S.C. § 794(d). The Title I standards incorporated by Section 504(d) with respect to employment discrimination claims differ in several important respects from the standards applicable to all other claims under Section 504.

Unlike the causation standard set forth in Section 504(a), which requires proof that the discrimination occurred "*solely* by reason of" the plaintiff's disability (29 U.S.C. § 794(a) (emphasis added)), Title I prohibits *all* "discriminat[ion] against a qualified individual on the basis of disability." 42 U.S.C. § 12112(a). Thus, Title I of the ADA—and, by extension, presumably Section 504(d) of the Rehabilitation Act—does not require proof that the plaintiff's disability was the exclusive cause of the defendant's allegedly discriminatory conduct, but instead merely proof that disability was one "motivating factor" (among perhaps many) for the defendant's conduct. *Martin* v. *Cal. Dep't of Veterans Affairs*, 560 F.3d 1042, 1048 (9th Cir.), cert. denied *sub nom*, *Estate of Martin* v. *Cal. Dep't of Veterans Affairs*, 130 S. Ct. 299 (2009) (quoting *Head* v. *Glacier Nw. Inc.*, 413 F.3d 1053, 1065 (9th Cir. 2005)); *Parker* v. *Columbia Pictures Indus.*, 204 F.3d 326, 337 (2d Cir. 2000).

Furthermore, in contrast to Title VI of the Civil Rights Act, which prohibits only intentional discrimination and which by virtue of its incorporation through Section 505(a)(2) otherwise applies to claims under Section 504, Title I of the ADA also forbids the use of "standards, criteria, or methods of administration" that "have the *effect* of discrimination on the basis of disability." 42 U.S.C. § 12112(b)(3) (emphasis added). Thus, under Title I of the ADA—and, there-

fore, presumably under Section 504(d) of the Rehabilitation Act—"'a facially neutral employment practice may be deemed illegally discriminatory without evidence of the employer's subjective intent to discriminate." *Raytheon Co.* v. *Hernandez*, 540 U.S. 44, 52–53 (2003) (alterations omitted) (quoting *Wards Cove Packing Co.* v. *Atonio*, 490 U.S. 642, 645–646 (1989), superseded by statute on other grounds, Civil Rights Act of 1991, Pub. L. No. 102-166, § 105, 105 Stat. 1071, 1074–1075 (codified as amended at 42 U.S.C. § 2000e-2(k))).

In addition to containing causation and *mens rea* standards that are significantly different than those that apply to non-employment discrimination claims brought under Section 504(a), Title I of the ADA also expressly prohibits a range of specific conduct that is not similarly barred under Section 504(a). For instance, Title I includes privacy and confidentiality provisions that define discrimination to include inquiries about applicants' or employees' disabilities (42 U.S.C. § 12112(d)(4)(A)) and disclosures of information concerning such disabilities, when acquired (42 U.S.C. § 12112(d)(3)(B)). By contrast, inquiries and disclosures concerning an individual's disability do not constitute independent violations of Section 504(a) because they are not, of themselves, "exclu[sions]" from "participation in" a "program or activity receiving Federal financial assistance" and are not otherwise deemed to constitute "discrimination" within the meaning of Section 504(a). 29 U.S.C. § 794(a); cf. *id.* § 705 (defining terms as used in the Rehabilitation Act). Similarly, in contrast to Section 504(a), Title I specifically requires "making reasonable accommodations" (42 U.S.C. § 12112(b)(5)(A)), such as "making existing facilities * * * readily accessible to" disabled individuals and providing them

"part-time or modified work schedules" (42 U.S.C. § 12111(9)(A)–(B)).

Finally, of particular relevance here, the employment-related duties imposed by Title I, unlike the general anti-discrimination provisions found in Section 504(a), are owed only by entities that employ fifteen or more people and then only to such entities' employees and applicants. See 42 U.S.C. § 12112 (prohibiting discrimination by "covered entit[ies]" against "qualified individual[s]"); *id.* § 12111(2), (5) (defining "covered entity" as "an employer" "who has 15 or more employees"); *id.* § 12111(8) (defining "qualified individual" as "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires"). Consistent with these definitional limitations, every court of appeals to consider the question has concluded that Title I protects employees and applicants for employment, but not independent contractors. See *Aberman* v. *J. Abouchar & Sons, Inc.*, 160 F.3d 1148, 1150 (7th Cir. 1998); *Johnson* v. *City of Saline*, 151 F.3d 564, 567–569 (6th Cir. 1998); *Birchem* v. *Knights of Columbus*, 116 F.3d 310, 312–313 (8th Cir. 1997); see also *Levinger* v. *Mercy Med. Ctr.*, 75 P.3d 1202, 1208 (Idaho 2003) (same).

2. Congress adopted Section 504(d) of the Rehabilitation Act in 1992, two years after enactment of the ADA. See Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569, 106 Stat 4344. As indicated by its plain terms, Section 504(d) reflected Congress's desire that employment discrimination claims brought under the Rehabilitation Act be sub-

ject to the same standards as employment discrimination claims brought under Title I of the ADA.[1]

Section 504(d)'s application of the standards of Title I of the ADA to private employment discrimination claims brought under Section 504 of the Rehabilitation Act mirrors Congress's directive in Title I itself that agencies authorized to enforce the two statutes "shall develop procedures to ensure that administrative complaints filed under [Title I] and under the Rehabilitation Act of 1973 are dealt with in a manner that * * * prevents imposition of inconsistent or conflicting standards" under the two provisions. 42 U.S.C. § 12117(b). See also H.R. Rep. No. 101-596, at 66 (1990) (Conf. Rep.), reprinted in 1990 U.S.C.C.A.N. 565, 575 (expressing Congress's intent that the ADA and the Rehabilitation Act be interpreted so as to avoid "inconsistent, conflicting standards"); H. Rep. No. 101-485(II), at 31–39 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 336–334 (explaining that Title I was intended to prohibit employment discrimination according to standards "[c]onsistent with regulations implementing section 504 of the Rehabilitation Act of 1973," including, for example, use of "comparable * * * definition[s]").

The enactment of Section 504(d) was meant to eliminate any remaining inconsistencies between the two statutory schemes. At the same time subsection

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[1] The Rehabilitation Act and the ADA are not redundant because their respective scopes, although overlapping, are not coextensive. The Rehabilitation Act applies to all recipients of federal funds without regard to their effect on commerce. The ADA applies to all employers of more than fifteen employees in industries affecting commerce without regard to their receipt of federal funds. Cf. App., *infra*, 6a–7a.

(d) was added to Section 504 of the Rehabilitation Act, virtually identical language was added, as subsection (g) to Section 501 of the Rehabilitation Act, which governs employment discrimination by the federal government, and as subsection (d) to Section 503, which governs employment discrimination by federal contractors. See 29 U.S.C. §§ 791(g), 793(d), 794(d). As the Senate report for the Rehabilitation Act Amendments of 1992 explains, the language was "included in order to ensure uniformity and consistency of interpretations" between the Rehabilitation Act and Title I of the ADA. S. Rep. No. 102-357, at 16, 71 (1992), reprinted in 1992 U.S.C.C.A.N. 3712, 3727, 3782. Accordingly, the courts of appeals have generally recognized that Section 504 and Title I "impose identical obligations upon employers," treating the two as "twin statutes" with regard to employment discrimination suits. *Garcia* v. *S.U.N.Y. Health Sci. Ctr.*, 280 F.3d 98, 113 n.3 (2d Cir. 2001) (quoting *Kilcullen* v. *N.Y. State Dep't of Labor*, 205 F.3d 77, 82 (2d Cir. 2000)).

B. Factual Background

Petitioner Yuma Anesthesia Medical Services LLC ("YAMS") is a medical practice group that provides anesthesia care in affiliation with the Yuma Regional Medical Center in Yuma, Arizona. YAMS comprises thirteen board-certified anesthesiologists, each of whom is either a shareholder of the company or an independent contractor. YAMS does not have and has never had any employees.

Respondent Lester Fleming is a recent medical school graduate who completed a residency in anesthesiology in 2005. Shortly before completing his residency, Fleming contacted YAMS seeking to join the group as an independent contractor. It is undisputed

that Fleming never applied for employment at, and has never been employed by, YAMS.

YAMS interviewed Fleming and agreed to engage his services. The parties signed a "medical services agreement," according to which Fleming agreed to provide anesthesiology services for YAMS as an independent contractor. After reaching this agreement, the Yuma Regional Medical Center, where all YAMS anesthesiologists practice, began the process of "credentialing" Fleming. Similar to a "background check," credentialing typically involves both verifying a doctor's education, training, licenses, and certifications, and contacting the doctor's prior schools, employers, supervisors, and associates to obtain references.

Although the nature and sequence of events during the credentialing process have not yet been subject to discovery or litigation, certain facts are undisputed for purposes of this appeal. The parties acknowledge, for example, that the credentialing committee received a letter from Fleming's personal physician stating that Fleming had sickle-cell anemia.[2] As part of the credentialing process, the medi-

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[2] Sickle-cell anemia is a life-long genetic blood disorder characterized by red blood cells that assume an abnormal "sickle" shape. Sickling decreases the cells' flexibility and results in a risk of acute clogging of veins and capillaries. Sickle-cell "crises" can restrict blood flow to organs, resulting in often severe pain (both acute and chronic) and organ damage. Sickle-cell crises can severely limit daily activities. Less severe crises are treated with hydration and narcotic pain killers, while more severe crises often require inpatient hospital care. See generally Nat'l Heart, Lung, & Blood Inst., Dep't of Health & Human Servs., *What Is Sickle Cell Anemia?*, http://www.nhlbi.nih.gov/health/dci/Diseases/Sca/SCA_WhatIs.html.

cal center had asked Fleming to disclose if he had any medical conditions that would affect his ability to practice medicine or for which he may need an accommodation. He had responded that he did not.

After YAMS informed Fleming that it had a variety of concerns regarding the results of the credentialing process, Fleming unilaterally terminated the medical services agreement. He later found work in Virginia.

C. Procedural Background

Fleming commenced the present action, alleging that YAMS had committed employment discrimination on the basis of Fleming's sickle cell anemia, in violation of Section 504 of the Rehabilitation Act.[3] The relevant portions of the amended complaint are directed exclusively at employment discrimination, alleging solely that YAMS and Fleming had "executed an employment contract" (1st Am. Compl. ¶¶ 11, 17, 20, reproduced in Appellant's Excerpts of Record ("ER"), at 25–28, *Fleming* v. *Yuma Reg'l Med. Ctr.*, No. 07-16427 (9th Cir.)); that YAMS was a "covered entity" (*id.* ¶ 32, ER 29); that YAMS had "refused to hire Dr. Fleming" on the basis of his disability (*id.* ¶ 34, ER 30); and that Fleming had "suffered damages * * * including past and future lost wages" as a result (*id.* ¶ 35, ER 30).

1. YAMS moved to dismiss Fleming's employment discrimination claim on the grounds that Flem-

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[3] The First Amended Complaint also asserted claims under Titles I and II of the ADA, the Arizona Employment Protection Act, and the Arizona Civil Rights Act. Fleming abandoned these claims in subsequent briefing before the district court (App., *infra*, 18a–19a) and has not pursued them on appeal.

ing was an independent contractor and independent contractors cannot maintain such claims under the Rehabilitation Act. The district court denied the motion because at that stage of the proceedings it was "not clear whether the relationship" between YAMS and Fleming "was one of employment or of an independent contractual nature." Order, at 8 (Oct. 16, 2006), Dkt. No. 42, *Fleming* v. *Yuma Reg'l Med. Ctr.*, No. 2:05-cv-3906 (D. Ariz.).

After discovery regarding whether Fleming was an employee or independent contractor, YAMS moved for, and the district court granted, summary judgment. App., *infra*, 17a–19a. Noting that Fleming "no longer disputes * * * that he was an independent contractor," the court held that the "protections of the Rehabilitation Act apply to an employee-employer relationship and do not extend to cover independent contractors." *Id.* at 18a–19a (citing *Wojewski* v. *Rapid City Reg'l Hosp., Inc.*, 450 F.3d 338, 345 (8th Cir. 2006)). Accordingly, the district court dismissed Fleming's employment discrimination claim. *Ibid.*

2. The Ninth Circuit reversed. App., *infra*, 1a–16a. As the Ninth Circuit framed the issue, whether independent contractors such as Fleming can assert employment discrimination claims under the Rehabilitation Act depends on "whether § 504(d), which refers to 'the standards applied under Title of the Americans with Disabilities Act * * * as such sections relate to employment,' incorporates Title I literally or selectively." App., *infra*, 1a. If Section 504(d) incorporates Title I "literally," then, with respect to employment discrimination claims, "the Rehabilitation Act * * * only covers employer-employee relationships." *Id.* at 2a. If, however, Section 504(d) incorpo-

rates Title I only "selectively," then "all individuals," including independent contractors, may bring employment discrimination claims under Section 504. *Ibid.* Recognizing that the circuits that have addressed the question are divided over the issue, the Ninth Circuit acknowledged that "[t]he Sixth and Eighth Circuits have concluded that Title I is incorporated literally, while the Tenth Circuit has concluded that Title I is incorporated selectively." *Ibid.* For its part, the Ninth Circuit—expressly "agree[ing] with the Tenth Circuit"—concluded that Section 504(d) incorporates Title I "selectively" rather than "*in toto*" (*ibid.*), and in particular incorporates only "'the substantive standards for determining *what* conduct violates the Rehabilitation Act, not the definition of *who* is covered under the Rehabilitation Act.'" *Id.* at 11a (quoting *Schrader* v. *Ray*, 296 F.3d 968, 972 (10th Cir. 2002)). In so holding, the Ninth Circuit specifically rejected the contention that Section 504(d) incorporates Title I's definitional provision, 42 U.S.C. § 12111, which expressly limits its reach to individuals who "hold or desire" an "employment position" with an "employer" of "15 or more employees." See App., *infra*, 10a–11a. Accordingly, the Ninth Circuit held that Fleming's employment discrimination suit "under § 504 is proper and his action * * * may proceed." *Id.* at 16a.

The court acknowledged, however, that "our decision puts us in conflict with the Sixth and Eighth Circuits." App., *infra*, 14a. Expressly rejecting the Eight Circuit's holding in *Wojewski* "that § 504(d) *does* incorporate the ADA's employee-employer requirement into the Rehabilitation Act," the panel found the Eighth Circuit's reasoning "not * * * persuasive." *Id.* at 14a–15a (emphasis added) (citing *Wojewski*, 450 F.3d at 345). Similarly, the Ninth Circuit

was "not moved by [the Sixth Circuit's] analysis" in *Hiler* v. *Brown*, 177 F.3d 542 (6th Cir. 1999), which "also incorporated, albeit indirectly, the ADA's [employer-employee] limitation into the Rehabilitation Act." *Id.* at 15a.

Despite its express rejection of the reasoning of these other courts, the Ninth Circuit conceded that "there is some force to the position taken by the district court and [YAMS] and endorsed by the Eighth and Sixth Circuits" (App., *infra*, 16a), and admitted that its own decision was "not entirely free from doubt" (*id.* at 6a). The court recognized that section 504(d), which "plainly refers us to Title I of the ADA 'as such sections relate to employment' * * * might be read to suggest that Title I was to be incorporated jot-for-jot into employment discrimination actions brought under the Rehabilitation Act," and that such actions are therefore available only to employees or applicants for employment—and not independent contractors. *Id.* at 16a. According to the Ninth Circuit, however, "this is not the best reading of the Rehabilitation Act." *Ibid.*

REASONS FOR GRANTING THE PETITION

This case cleanly presents a discrete and important question of statutory interpretation that has irreconcilably divided the lower courts. Although the decision below—to allow an independent contractor to bring an employment discrimination claim under the Rehabilitation Act—is supported by a decision of the Tenth Circuit, it squarely conflicts with decisions of the Eighth Circuit and the Idaho Supreme Court, and is in substantial tension with decisions of the Sixth and D.C. Circuits. As a result of this long-standing and expressly-recognized division, the Rehabilitation Act is being applied inconsistently, with

employment discrimination claims either dismissed or allowed to proceed depending on no more than location. The division of authority has even created an intra-state conflict: in Idaho, independent contractors are free to bring employment discrimination actions under Section 504 in federal court, but not in state court. Because this case presents an ideal vehicle for resolving this deep and intractable conflict, and because the question presented implicates a recurring issue of great practical importance to the administration of a significant anti-discrimination law, further review by this Court is warranted.

I. THE LOWER COURTS ARE DEEPLY DIVIDED OVER THE EXTENT TO WHICH SECTION 504(d) OF THE REHABILITATION ACT INCORPORATES TITLE I OF THE ADA.

As the Ninth Circuit itself recognized, its decision in this case exacerbates a clear division among the lower courts over the extent to which Section 504(d) of the Rehabilitation Act incorporates Title I of the ADA. On one side of that split stand the Ninth and Tenth Circuits; on the other side, the Sixth, Eighth, and D.C. Circuits and the Idaho Supreme Court. The disagreement is far from academic. Its resolution will determine whether independent contractors—and, by implication, employees of entities with fewer than fifteen employees—can maintain employment discrimination actions under Section 504 of the Rehabilitation Act, and, by extension, whether such individuals are owed the duties set forth in Title I of the ADA.

A. The Ninth and Tenth Circuits Have Held that Section 504(d) Does Not Incorporate Title I's Limitations.

Here, the Ninth Circuit concluded that Section 504(d) incorporates Title I only "selectively" rather than "*in toto*." App., *infra*, 2a. The court specifically rejected the notion that Section 504(d) "adopts those sections of Title I that would restrict the scope of the Rehabilitation Act." *Id.* at 9a. Accordingly, the Ninth Circuit concluded that "all individuals," including independent contractors, may bring employment discrimination claims under Section 504 notwithstanding the undisputed fact that Title I "only covers employer-employee relationships in the workplace." *Id.* at 2a.

In so holding, the Ninth Circuit expressly "agree[d]" with the Tenth Circuit's decision in *Schrader* "that Title I is incorporated selectively" through Section 504(d). *Ibid.* In that case, an employee of a medical services firm brought a Section 504 suit, alleging employment discrimination on the basis of her medical disability. 296 F.3d at 969–970. Because the defendant employer had fewer than fifteen employees, the "central question" in *Schrader* was "whether § 504(d) of the Rehabilitation Act incorporates the ADA's 'fifteen or more employees' definition of employer as a limitation on the definition of entities covered by the Rehabilitation Act" in employment discrimination lawsuits. *Id.* at 970–971. The Tenth Circuit held that it does not. In language quoted with approval by the Ninth Circuit in the decision below (see App., *infra*, 11a), the Tenth Circuit concluded that Section 504(d) incorporates only "'the substantive standards for determining *what* conduct violates the Rehabilitation Act, not the definition of

who is covered under the Rehabilitation Act.'" *Schrader*, 296 F.3d at 972. Holding that "§ 504(d) does not incorporate the ADA's definition of 'employer' into the Rehabilitation Act's scope of coverage" (*id.* at 974), the court allowed the lawsuit to proceed.[4]

Although the plaintiff in *Schrader* was an employee rather than an independent contractor like the respondent here, the court's reasoning—according to which Section 504(d) does not incorporate Title I's "scope of coverage" (*ibid.*)—strongly suggests that the Tenth Circuit, like the Ninth, would hold that independent contractors may bring employment discrimination claims under the Rehabilitation Act.

B. Other Circuits and the Idaho Supreme Court Have Held that Section 504(d) Incorporates the Limitations of Title I.

The Ninth Circuit's decision in this case and the Tenth Circuit's decision in *Schrader* are in irreconcilable conflict with decisions of the Eighth Circuit and the Idaho Supreme Court, and in substantial tension with decisions of the Sixth and D.C. Circuits. There is little doubt that if respondent had brought his employment discrimination suit in these other jurisdictions, it would have been dismissed.[5]

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[4] In tension with the Tenth Circuit's decision in *Schrader*, some federal agencies have limited the reach of certain Section 504 requirements to those recipients of federal financial assistance that employ fifteen or more persons, as required under Title I of the ADA. See, *e.g.*, 45 C.F.R. § 84.52(d)(1) (limiting the applicability of certain section 504 regulations to hospitals "that employ[] fifteen or more persons").

[5] District courts within other circuits have sided with the Eighth Circuit, D.C. Circuit, and Supreme Court of Idaho. See,

In *Wojewski*, the Eighth Circuit considered circumstances remarkably similar to those alleged here: a surgeon serving on the staff of a hospital as an independent contractor was terminated when the hospital became concerned that his bipolar disorder was endangering patients. 450 F.3d at 341. The surgeon filed suit, alleging, *inter alia*, employment discrimination under Section 504. The Eighth Circuit affirmed dismissal of the suit. With respect to the Section 504 claim, the court considered the "crucial issue" to be "whether a non-employee can be a qualified individual under § 504" for purposes of employment discrimination actions. *Id.* at 344. It answered that question in the negative, stating that "[g]iven the similarity between Title I and the Rehabilitation Act, * * * we construe both to apply to an employee-employer relationship and decline appellant's invitation to extend coverage of the Rehabilitation Act to independent contractors." *Id.* at 345.[6]

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e.g., *Cortes-Rivera* v. *Dep't of Corr. & Rehab. of P.R.*, 617 F. Supp. 2d 7, 25 (D.P.R. 2009) (applying *Wojewski* to dismiss an employment discrimination claim by an independent contractor); c.f. *McGovern* v. *MVM, Inc.*, No. Civ.A.04-2541, 2004 WL 2554565, at *2 (E.D. Pa. Nov. 9, 2004) (dismissing employment discrimination claim brought under the Rehabilitation Act because the plaintiff was an "independent contractor" and not an "employee").

[6] Although *Wojewski* might be read to suggest that Section 504 permits *only* employment discrimination lawsuits, and thus grants non-employees no rights of any sort, the Eighth Circuit has subsequently entertained non-employment-related claims under Section 504. See, *e.g.*, *M.P. ex rel. K. and D.P.* v. *Indep. Sch. Dist. No. 721*, 439 F.3d 865, 868 (8th Cir. 2006) (holding in a non-employment-related case that the plaintiff there "has a right of action for damages under Section 504"). And district courts have generally interpreted *Wojewski* as standing for the proposition that Section 504 requires an employee-employer relationship for employment discrimination actions, but not other

That conclusion cannot be reconciled with the Ninth Circuit's decision in this case. See App., *infra*, 14a ("our decision puts us in conflict with the * * * Eighth Circuit").

The decision below also squarely conflicts with the Idaho Supreme Court's decision in *Levinger*, 75 P.3d 1202. Like the respondent in this case, the *Levinger* plaintiff was an independent contractor with a medical practice group that provided anesthesiology services to the local medical center. After he became mentally ill and was involuntarily committed to a psychiatric ward, the medical group terminated his service contract, and the medical center revoked his staff privileges. *Id.* at 1204. Each refused to reengage his services following the completion of his treatment and restoration of his medical license. *Ibid.* The plaintiff filed suit, alleging, among other things, employment discrimination under Section 504. The Idaho Supreme Court affirmed the trial court's grant of summary judgment on that claim. Observing that "the standards found in Title I of the ADA are used to determine whether there has been actionable employment discrimination" under the Rehabilitation Act (75 P.3d at 1208 (citing 29 U.S.C. § 794(d)), and that "the employment discrimination provisions under Title I of the ADA do not protect independent contractors" (*ibid.* (citing *PGA Tour, Inc.* v. *Martin*, 532 U.S. 661, 692 (2001) (Scalia, J., dissenting)), the court concluded that Levinger, as an independent contractor, "does not have any employment discrimination rights under * * * the Rehabilitation Act" (*ibid.*). That conclusion is, obviously, directly contrary to the decision below.

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actions, under the Rehabilitation Act. See, *e.g.*, *Cortes-Rivera*, 617 F. Supp. 2d at 25.

The decision below is also contrary to the D.C. Circuit's decision in *Redd* v. *Summers*, 232 F.3d 933 (D.C. Cir. 2000). The *Redd* plaintiff was employed by a government contractor that, pursuant to its contract with the government, provided tour guides at the Bureau of Engraving and Printing. Upon her termination, the plaintiff sued the Bureau under Sections 501 and 504 of the Rehabilitation Act. Precisely "because [the plaintiff] was never an employee of the Bureau," the D.C. Circuit affirmed the dismissal of her employment discrimination claim, which the court considered only under Section 501.[7] *Id.* at 936, 941. The court did allow the plaintiff's Section 504 claim to proceed, but that claim, under Section 504(a), was for denial of the opportunity to participate in the tour guide contract, not for employment discrimination. *Id.* at 941.[8] Thus, much as the Idaho

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[7] Section 501, 29 U.S.C. § 791, prohibits disability-based employment discrimination by the federal government. Under D.C. Circuit precedent, Section 501, rather than Section 504, is the exclusive basis for disability-based employment discrimination claims against the federal government. See *Taylor* v. *Small*, 350 F.3d 1286, 1290–1291 (D.C. Cir. 2003) (noting circuit split on issue). But any distinction between Sections 501 and 504 is immaterial for present purposes. Enacted at the same time and using essentially identical language as Section 504(d) (see *supra*, p. 11), Section 501(g) incorporates the standards of Title I of the ADA for purposes of employment discrimination claims brought under Section 501. See 29 U.S.C. § 791(g). Thus, the D.C. Circuit's analysis under Section 501(g) applies fully to Section 504(d).

[8] Without explanation, the *Redd* court stated that the plaintiff could also pursue a claim under Section 504 for having been "retaliated against for protesting" the denial of an opportunity to participate in the tour guide contract. 232 F.3d at 941. But insofar as the Treasury Department regulation cited by the court in support of that statement, 31 C.F.R. § 17.140, is by its

Supreme Court held in *Levinger*, the D.C. Circuit recognized in *Redd* that individuals who are not employees may not bring employment discrimination claims under the Rehabilitation Act, although they may assert claims for other forms of discrimination.

The decision below is also in substantial tension with the Sixth Circuit's decision in *Hiler*, in which the Sixth Circuit considered whether "the Rehabilitation Act creates a private cause of action against supervisors, in their individual capacities, for alleged retaliatory employment practices." 177 F.3d at 544. The Sixth Circuit held that it does not because "individuals who do not otherwise meet the statutory definition of 'employer' cannot be held liable under the Rehabilitation Act" for employment discrimination. *Id.* at 547. The Ninth and Tenth Circuits have each acknowledged that *Hiler*'s holding is contrary to their decisions in this case and *Schrader*, respectively. See App., *infra*, 14a–15a ("our decision puts us in conflict with the Sixth * * * Circuit" which has "incorporated, albeit indirectly, the ADA's [employee-employer] limitation into the Rehabilitation Act"); *Schrader*, 296 F.3d at 974 ("Although we believe that * * * § 504(d) does not incorporate the ADA's definition of 'employer' into the Rehabilitation Act's scope of coverage, we recognize that the Sixth Circuit

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terms limited to "discrimination in employment." Inasmuch as Section 504 itself bars retaliation only insofar as the ADA's anti-retaliation provision is incorporated through Section 504(d) (see *infra*, n.9), the court's off-hand statement is inconsistent with its explicit recognition that the plaintiff, as a non-employee, could not pursue an employment discrimination claim under the Rehabilitation Act. Cf. *Hiler*, 177 F.3d at 547; *infra*, n.9. That apparent confusion is an additional reason why review by this Court is warranted.

reached the opposite conclusion in *Hiler* * * *, albeit with regard to a different issue.").[9]

This Court's intervention is required to resolve the deep division among the lower courts.

II. THE CONFLICT IS UNDERMINING THE UNIFORM APPLICATION OF THE NATION'S DISABILITY DISCRIMINATION LAWS.

If the deep division among the lower courts is allowed to persist, individuals in the Ninth and Tenth Circuits will be able to state claims under the Rehabilitation Act in a far broader range of circumstances, and litigate their claims according to far less demanding standards, than individuals in the Sixth, Eighth, or D.C. Circuits or Idaho state courts. Moreover, within those circuits where Section 504 is interpreted to permit employment discrimination claims by independent contractors and other individuals who may not bring such claims under Title I

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[9] The *Hiler* plaintiff, a government employee, brought claims under Sections 501 and 504 of the Rehabilitation Act. As noted above (see *supra*, n.7), Section 501 prohibits disability-based employment discrimination by the federal government. *Hiler* does not distinguish between the Sections 501 and 504 claims because the relevant provisions of each are identical. Exactly as Section 504(d) does with respect to employment discrimination claims brought under Section 504 of the Rehabilitation Act, Section 501(g) incorporates Title I and "sections 501 through 504" of the ADA with respect to employment discrimination claims brought under Section 501 of the Rehabilitation Act. 29 U.S.C. §§ 791(g), 794(d); see also *supra*, p. 11. Accordingly, Sections 501(g) and 504(d) of the Rehabilitation Act both incorporate, with respect to employment discrimination claims, Section 503(a) of the ADA, the ADA's anti-retaliation provision codified at 42 U.S.C. § 12203(a).

of the ADA, the Rehabilitation Act will, contrary to congressional intent, be applied differently than Title I of the ADA.

A. The Decision Below and the Tenth Circuit's Decision in *Schrader* Impose Duties and Apply Standards Not Imposed or Applied Elsewhere.

The split in the lower courts over the proper interpretation of Section 504(d) means that recipients of federal funding face dramatically different obligations under the Rehabilitation Act depending on location alone. As we have explained (*supra*, p. 8), Title I of the ADA, which Section 504(d) incorporates with respect to employment discrimination claims, imposes certain duties that are not otherwise owed under Section 504(a). For example, entities subject to Title I are required to "mak[e] reasonable accommodations" (42 U.S.C. § 12112(b)(5)(A)) for covered individuals, by, for instance providing "part-time or modified work schedules" (42 U.S.C. § 12111(9)(B)). Only in those circuits that have interpreted Section 504(d) as incorporating Title I's standards "for determining *what* conduct violates the Rehabilitation Act" but not Title I's "definition of *who* is covered" (App., *infra*, 11a (quoting *Schrader*, 296 F.3d at 972)), are the duties imposed by Title I owed by all recipients of federal funds, not only those who employ fifteen or more people, and owed not only to employees, but also to independent contractors. Thus, in the Ninth and Tenth Circuits, but not in the Sixth, Eighth, or D.C. Circuits, recipients of federal funds are required to provide independent contractors with the full panoply of accommodations required by Title I.

That geographic disparity in substantive obligations is compounded by a concomitant disparity in the legal standards that are applied to claims brought under Section 504. As we explained above (*supra*, pp. 5–8), complaints under Section 504 alleging employment discrimination are subject to different standards than complaints alleging other forms of discrimination.

Employment discrimination claims are, by virtue of Section 504(d), subject to the standards of Title I of the ADA. With respect to causation, all that Title I requires is proof that the plaintiff's disability was one "motivating factor" (among perhaps many) for the defendant's conduct. *Martin*, 560 F.3d at 1048. Moreover, because Title I forbids practices that "have the *effect* of discrimination on the basis of disability" (42 U.S.C. § 12112(b)(3) (emphasis added)), a plaintiff able to invoke its standards need not prove a "subjective intent to discriminate." *Raytheon*, 540 U.S. at 52–53.

Complaints that do not allege employment discrimination are, by contrast, governed by the standards set forth in Section 504(a) and incorporated through Section 505(a)(2). Under Section 504(a), a plaintiff must prove that the alleged discrimination occurred "*solely* by reason of" the plaintiff's disability. 29 U.S.C. § 794(a) (emphasis added); see also *Severino*, 935 F.2d at 1183. Similarly, because the implied right of action conferred through Section 505a(a)(2)'s incorporation of "[t]he remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964" (29 U.S.C. § 794a(a)(2)) requires proof of discriminatory intent (see *Sandoval*, 532 U.S. at 281; *Guardians Ass'n*, 463 U.S. at 584), a plaintiff seeking compensatory damages under Sec-

tion 504(a) for non-employment discrimination "must prove a *mens rea* of 'intentional discrimination.'" *Mark II.*, 513 F.3d at 938 (quoting *Duvall*, 260 F.3d at 1138) accord *Powers*, 184 F.3d at 1153; *Wood*, 978 F.2d at 1219.

Thus, whether an individual is entitled to bring an "employment discrimination" claim under Section 504 has significant implications for what the plaintiff must prove in order to prevail under that provision. In the Ninth and Tenth Circuits, independent contractors and employees of entities with fewer than fifteen employees are—thanks to *Schrader* and the decision below—able to bring employment discrimination claims under Section 504, and are thus presumably able to invoke the standards of Title I, which allows them to prevail so long as their disability was a "motivating factor" in the defendant's conduct and the defendant's conduct had a discriminatory effect.[10] But in the Sixth, Eighth, and D.C. Circuits, and in the Idaho state courts, independent contractors and, by implication, employees of entities with fewer than fifteen employees, cannot bring "employment discrimination" claims under Section 504, and are therefore unable to invoke the stan-

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[10] We say such individuals are "presumably" able to invoke the standards of Title I because the circuits are divided over whether Section 504(d) incorporates Title I's "motivating factor" standard with respect to Section 504 employment discrimination actions. The First Circuit has applied the "motivating factor" standard to employment discrimination claims under Section 504. See, *e.g.*, *Oliveras-Sifre* v. *P.R. Dep't of Health*, 214 F.3d 23, 25 & n.2 (1st Cir. 2000). The Fifth Circuit, however, has held that the "motivating factor" standard does not apply, notwithstanding Section 504(d). See *Soledad* v. *U.S. Dep't of Treasury*, 304 F.3d 500, 503–505 (5th Cir. 2002). Neither the Ninth nor the Tenth Circuit has spoken to this issue.

dards of Title I, with the consequence that they, if they are to prevail, must prove both that their disability was the "sole" cause of the defendant's conduct and that the defendant acted with discriminatory intent.

B. The Decision Below and the Tenth Circuit's Decision in *Schrader* Undermine Congress's Intent that the Rehabilitation Act and the ADA Be Applied Consistently.

Congress enacted Section 504(d)—and the virtually identical provisions found in Sections 501(g) and 503(d), 29 U.S.C. §§ 791(g), 793(d)—to ensure that employment discrimination claims would be treated consistently, whether they were brought under the Rehabilitation Act or under Title I of the ADA. See *supra*, pp. 9–11. As the accompanying Senate report explained, the language was "included in order to ensure uniformity and consistency of interpretations" between the two statutes. S. Rep. No. 102-357, at 16, 71.

But *Schrader* and the decision below defeat that goal. It is well-established that neither independent contractors nor employees of entities with fewer than fifteen employees can bring employment discrimination claims under Title I of the ADA. See *Clackamas Gastroenterology Assocs.* v. *Wells*, 538 U.S. 440, 441–442 (2003); *Aberman*, 160 F.3d at 1150; *Johnson*, 151 F.3d at 567–569; *Birchem*, 116 F.3d at 312–313. Yet, in the Ninth Circuit, and likely in the Tenth Circuit as well, independent contractors *can* bring employment discrimination claims under the Rehabilitation Act, as can employees of entities with fewer than fifteen employees.

C. The Conflict Affects Large Sectors of the Economy.

The question presented by this case affects many, probably millions, of people and entities throughout the country.

The Rehabilitation Act applies to all recipients of federal funding (see 29 U.S.C. § 794(a)–(b)), an already large class that has grown even larger in recent times as the federal government distributes financial assistance and stimulus money to combat the current economic recession. Cf. Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 613; American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 303. For example, entities covered by the Rehabilitation Act include not only most of the nation's hospitals, which participate in the Medicare and Medicaid programs (see *United States* v. *Baylor Univ. Med. Ctr.*, 736 F.2d 1039, 1040 (5th Cir. 1984)), and universities, which participate in student financial aid programs (cf. *Bennett-Nelson* v. *La. Bd. of Regents*, 431 F.3d 448, 452–453 (5th Cir. 2005)), but also most of the nation's airports, which receive assistance through the Airport and Airway Trust Fund (see Fed. Aviation Admin., *Airport and Airway Trust Fund (AATF)*, http://www.faa.gov/about/office_org/headquarters_offices/acp/aatf/), and two of the nation's three auto makers, which have received assistance through the Troubled Asset Relief Program (see U.S. Dept. of the Treas., Office of Financial Stability, *Citizens' Report: On the Troubled Asset Relief Program (TARP)*, at 8, available at <http://financialstability.gov/docs/09%20OFS_CitizensReport%20MA R2.pdf>).

Recipients of federal funds, like other entities, often retain the services of independent contractors. As

demonstrated by the facts of this case, for example, hospitals frequently utilize physicians retained as independent contractors. Similarly, universities frequently hire visiting scholars and guest lecturers as independent contractors. See, *e.g.*, Brown Univ., *Independent Contractor Policy and Procedures*, http://www.brown.edu/Administration/Controllers_Office/policies/IndependentContractorPolicyProcedures.html. And, like other entities, recipients of federal funds also often use independent contractors to maintain their buildings, to audit their books, and to provide the myriad other professional services that businesses ordinarily hire independent contractors to deliver.

Thus, whether recipients of federal funds owe independent contractors the duties imposed by Title I of the ADA, and whether claims brought by independent contractors under the Rehabilitation Act will be judged by the standards of Title I, are questions that affect innumerable entities and individuals across the country. Inasmuch as several circuits and a state court of last resort have rendered conflicting decisions on "the same important matter" of federal statutory interpretation (S. Ct. R. 10(a)), review by this Court is warranted.

III. THIS CASE IS AN IDEAL VEHICLE FOR RESOLVING THE CONFLICT.

This case offers an ideal vehicle for resolving the widespread, long-standing, and expressly-recognized conflict among the lower courts over the extent to which Section 504(d) of the Rehabilitation Act incorporates Title I of the ADA.

There is no doubt that this case squarely presents that conflict. The district court dismissed respondent's suit in express reliance on the Eighth

Circuit's decision in *Wojewski*. App., *infra*, 19a. The Ninth Circuit reinstated respondent's suit, expressly rejecting *Wojewski* and the Sixth Circuit's decision in *Hiler* in favor of the Tenth Circuit's contrary decision in *Schrader*. *Id.* at 2a, 14a–16a, Thus, the outcome of this case depends on how the conflict is resolved.

Moreover, as the Ninth Circuit noted below, "the facts of this case are simple and not contested." *Id.* at 2a. Respondent has conceded that he was an independent contractor (*id.* at 18a); the only claim respondent asserts under Section 504 of the Rehabilitation Act is one alleging employment discrimination (1st Am. Compl., ER 22–33; App., *infra*, 3a); and that claim is the only claim remaining in the case (App., *infra*, 18a–19a).

In short, this case cleanly presents an important question of considerable practical importance that has divided the lower courts. Accordingly, the petition should be granted.

IV. THE NINTH CIRCUIT ERRED.

Review is also warranted because the Ninth Circuit plainly erred in holding that independent contractors may bring employment discrimination claims under Section 504 of the Rehabilitation Act notwithstanding Section 504(d)'s incorporation of the standards of Title I of the ADA. The decision below is wrong for several reasons.

As an initial matter, it is illogical to allow *employment* discrimination claims by independent contractors, who are, by definition, *not* employees. See, *e.g.*, *Hunt* v. *Mo. Dep't of Corr.*, 297 F.3d 735, 740 (8th Cir. 2002) (noting "well-established rule that independent contractors are not employees").

Logic aside, the Ninth Circuit's decision cannot be reconciled with Section 504(d), which provides that "[t]he standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act." 29 U.S.C. § 794(d). Title I of the ADA plainly applies only to employers and employees, not to independent contractors and those who contract for their services. See *Aberman*, 160 F.3d at 1150; *Johnson*, 151 F.3d at 567–569; *Birchem*, 116 F.3d at 312–313. That limitation is an inextricable element of the standards applied under Title I, and thus, by virtue of Section 504(d), necessarily applies equally to employment discrimination claims brought under Section 504 of the Rehabilitation Act.

The decision below rests on the conclusion that Section 504(d) incorporates Title I "selectively" rather than "*in toto*," and in particular incorporates only "'the substantive standards for determining *what* conduct violates the Rehabilitation Act, not the definition of *who* is covered under the Rehabilitation Act.'" App., *infra*, 11a (quoting *Schrader*, 296 F.3d at 972). The Ninth Circuit reached its conclusion in part because it could "find no language in § 504(d) that explicitly adopts *those sections* of Title I that would restrict the scope of the Rehabilitation Act." *Id.* at 9a (emphasis added). But, contrary to the Ninth Circuit's implicit assumption, the provisions of Title I that restrict its scope to employees are not discrete "sections" susceptible to "selective[]" exclusion from incorporation. On the contrary, the Title I standards are, by their own terms, necessarily limited to the employer-employee context. Thus,

Title I's general anti-discrimination standard provides that

> [n]o covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112(a). It is clear on its face that this standard covers only employees and applicants for employment—there is simply no way to make sense of phrases like "the hiring * * * of employees" "employee compensation," and "terms, conditions, and privileges of employment" outside that context.

Moreover, it is impossible to understand what Title I's anti-discrimination standard requires without knowing how Congress defined the terms "covered entity" and "qualified individual." Title I defines the term "covered entity" to mean, in relevant part, "an employer" (42 U.S.C. § 12111(2)), and defines the term "qualified individual" to mean, in relevant part, "an individual with a disability who * * * can perform the essential functions of the employment position that such individual holds or desires" (42 U.S.C. § 12111(8)). Plainly there is no way to apply § 12112(a) without reference to these definitions—they are bound up in the standard itself. Accordingly, the Ninth Circuit was wrong to conclude that Section 504(d) incorporates only "'the substantive standards for determining *what* conduct violates the Rehabilitation Act, not the definition of *who* is covered under the Rehabilitation Act.'" App., *infra*, 11a (quoting *Schrader*, 296 F.3d at 972).

The decision below, which applies different standards to employment discrimination claims brought under the Rehabilitation Act than to those brought under Title I of the ADA, is also wrong for another reason—it ignores Congress's intent that Section 504 and Title I be implemented in such a way as to ensure that "actions which allege employment discrimination under [Title I] and under the Rehabilitation Act" be treated in a manner that "prevents imposition of inconsistent or conflicting standards" under the two provisions. 42 U.S.C. § 12117(b). It also takes no account of Congress's purpose in enacting Section 504(d) itself: "to ensure uniformity and consistency of interpretations" between the Rehabilitation Act and Title I of the ADA. S. Rep. No. 102-357, at 16, 71.

Thus, the plain language and legislative histories of both Section 504(d) and Title I indicate that Congress intended to create a single, uniform standard to govern all disability-related employment discrimination claims, whether brought under Section 504 of the Rehabilitation Act or Title I of the ADA. This Court's review is necessary—not only to resolve the deep and long-standing conflict among the lower courts, but also to vindicate Congress's express intention that Title I of the ADA and Section 504 of the Rehabilitation Act be applied in a consistent manner.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 2010

APPENDICES

APPENDIX A:
THE NINTH CIRCUIT'S OPINION

* * *

United States Court of Appeals,
Ninth Circuit.

Lester FLEMING, Plaintiff-Appellant,
v.
YUMA REGIONAL MEDICAL CENTER; Yuma Anesthesia Medical Services, Defendants-Appellees.

No. 07-16427.

Argued and Submitted Feb. 12, 2009.
Filed Nov. 19, 2009.

Before: RONALD M. GOULD and JAY S. BYBEE, Circuit Judges, and TIMOTHY TYMKOVICH,* Circuit Judge.

BYBEE, Circuit Judge:

This case presents a question of first impression in our court: Does § 504 of the Rehabilitation Act, 29 U.S.C. § 794, extend to a claim of discrimination brought by an independent contractor? In order to answer that question, we must decide whether § 504(d), which refers to "the standards applied under Title I of the Americans with Disabilities Act * * * as such sections relate to employment," incorporates Title I literally or selectively. If Title I is incor-

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* The Honorable Timothy Tymkovich, United States Circuit Judge for the Tenth Circuit, sitting by designation.

porated literally, then the Rehabilitation Act is limited by the ADA and only covers employer-employee relationships in the workplace; if selectively, then the Rehabilitation Act covers all individuals "subject to discrimination under any program or activity receiving Federal financial assistance," who may bring an employment discrimination claim based on the standards found in the ADA. 29 U.S.C. § 794(a). The Sixth and Eighth Circuits have concluded that Title I is incorporated literally, *Wojewski* v. *Rapid City Reg'l Hosp.*, 450 F.3d 338 (8th Cir. 2006); *Hiler* v. *Brown*, 177 F.3d 542 (6th Cir. 1999), while the Tenth Circuit has concluded that Title I is incorporated selectively. *Schrader* v. *Ray*, 296 F.3d 968 (10th Cir. 2002). We agree with the Tenth Circuit, and conclude that § 504 incorporates the "standards" of Title I of the ADA for proving when discrimination in the workplace is actionable, but not Title I *in toto*, and therefore the Rehabilitation Act covers discrimination claims by an independent contractor. Accordingly, we reverse the judgment of the district court.

I

For purposes of this appeal, the facts of this case are simple and not contested. Dr. Lester Fleming is an anesthesiologist who suffers from sickle cell anemia. In 2005, Fleming applied for a position as an anesthesiologist at the Yuma Regional Medical Center ("Yuma"). Upon learning of Fleming's sickle cell anemia, Yuma told him that it would not be able to accommodate his operating room and call schedules. Fleming declined to accept this condition of employment, effectively canceling the contract.

Fleming brought suit against Yuma[1] for breach of his employment contract and employment discrimination in violation of § 504 of the Rehabilitation Act. The district court granted summary judgment in Yuma's favor, ruling that (1) Fleming was an independent contractor, and that (2) independent contractors are not protected by the Rehabilitation Act. Fleming appeals the ruling that the Rehabilitation Act does not apply to independent contractors; he does not, however, appeal the district court's finding that he is an independent contractor.[2]

II

The Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.*, was the "first major federal statute designed to protect the rights of * * * the handicapped people of this country." *Smith* v. *Barton*, 914 F.2d 1330, 1338 (9th Cir. 1990); *see also Consol. Rail Corp.* v. *Darrone*, 465 U.S. 624, 626, 104 S. Ct. 1248, 79 L.Ed.2d 568 (1984) (describing the Act as "a comprehensive federal program aimed at improving the lot of the handicapped"). Section 504 creates a private right of action for individuals subjected to disability discrimination by any program or activity receiving federal financial assistance, *Kling* v. *Los Angeles County*, 633 F.2d 876, 878 (9th Cir. 1980), including employment discrimination in such programs, *Consol. Rail*, 465 U.S. at 632, 104 S. Ct. 1248; *Boyd* v. *U.S. Postal*

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[1] Fleming also brought suit against Yuma Anesthesia Medical Services ("YAMS"). The distinction between Yuma and YAMS is not relevant for the purposes of this appeal. We therefore will refer to the defendants collectively as "Yuma."

[2] We review a district court's grant of summary judgment *de novo*. *United States* v. *City of Tacoma*, 332 F.3d 574, 578 (9th Cir. 2003).

Serv., 752 F.2d 410, 413 (9th Cir. 1985). It provides that "[n]o otherwise qualified individual with a disability * * * shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). The Rehabilitation Act broadly defines "program or activity" to include "all of the operations of – * * * an entire corporation, partnership, or other private organization, or an entire sole proprietorship" if the entity as a whole receives federal assistance or if the entity "is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation," and various other services. 29 U.S.C. § 794(b)(3)(A).

The Rehabilitation Act, as amended, incorporates various standards and remedies from other civil rights laws. Most important for our case, § 504(d) provides that "[t]he standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under Title I of the Americans with Disabilities Act * * * as such sections relate to employment." 29 U.S.C. § 794(d). *See* 42 U.S.C. §§ 12111-17, 12201-04, 12210. Title I of the ADA defines key terms in the act, § 12111, defines discrimination in the workplace, § 12112, provides for defenses and limitations for employees using illegal drugs or alcohol, §§ 12113-14, 12210, and commits enforcement to the Equal Opportunity Employment Commission and the Attorney General, § 12117. Although we have not addressed the question, other circuits have held that independent contractors are not covered by Title I. *Aberman* v. *J. Abouchar & Sons, Inc.*, 160 F.3d 1148, 1150 (7th Cir.

1998); *Johnson* v. *City of Saline*, 151 F.3d 564, 567-69 (6th Cir. 1998); *Birchem* v. *Knights of Columbus*, 116 F.3d 310, 312-13 (8th Cir. 1997).

The issue before us is whether Dr. Fleming, as an independent contractor, may maintain suit against Yuma based on § 504 of the Rehabilitation Act. Fleming urges us to read § 504(d) to mean that "[t]he *standards* " of Title I of the ADA-and not Title I itself-should be "used to determine whether this section has been violated in a complaint alleging employment discrimination." 29 U.S.C. § 794(d) (emphasis added). Relying on the Tenth Circuit's opinion in *Schrader*, Dr. Fleming would have us hold that § 504 does not literally incorporate Title I of the ADA and, therefore, "§ 504(d) addresses only the substantive standards for determining *what* conduct violates the Rehabilitation Act, not the definition of *who* is covered." *Schrader*, 296 F.3d at 972.

Yuma, not surprisingly, offers a different view. It would have us hold that § 504(d) incorporates Title I of the ADA *in toto*, including any limitations found in those provisions. Relying on decisions from the Sixth and Eighth Circuits, Yuma argues that "the focus of the Rehabilitation Act is upon providing remedies for individuals who are employees" and therefore the Rehabilitation Act, like Title I of the ADA, "requires an employee-employer relationship." *Wojewski*, 450 F.3d at 345. The district court agreed with Yuma and found that Fleming was not an employee, but an independent contractor. It then held, citing *PGA Tour, Inc.* v. *Martin*, 532 U.S. 661, 692, 121 S. Ct. 1879, 149 L.Ed.2d 904 (2001) (Scalia, J., dissenting), that "[e]mployment actions under the Rehabilitation Act may only be brought by employees and cannot be brought by independent contractors." Thus, Yuma

and the district court would have us read Title I of the ADA into § 504(d) as though Title I had been incorporated on a jot-for-jot basis.

III

Although the matter is not entirely free from doubt, we agree with Dr. Fleming that he is covered by the Rehabilitation Act even though he is an independent contractor. We reach this conclusion for several reasons.

A

First, the scope of the Rehabilitation Act is broader than the ADA.[3] The Rehabilitation Act covers any "otherwise qualified individual" who has been "excluded from the participation in, or denied the benefits of, or * * * subjected to discrimination under any program or activity receiving Federal fi-

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[3] We note that the Rehabilitation Act and the ADA appear to rely on different constitutional footings, which may explain the difference in scope. The Rehabilitation Act, at least insofar as it applies to private entities, draws on Congress's conditional spending power. U.S. Const. art. I, § 8, cl. 1. *See* 29 U.S.C. § 794(a) (regulating "any program or activity receiving Federal financial assistance"); *Constantine* v. *Rectors and Visitors of George Mason Univ.*, 411 F.3d 474, 491 (4th Cir. 2005) (explaining that § 504 of the Rehabilitation Act "'invokes Congress' power under the Spending Clause to place conditions on the grant of federal funds.'" (quoting *Barnes* v. *Gorman*, 536 U.S. 181, 186, 122 S. Ct. 2097, 153 L.Ed.2d 230 (2002))) (citation omitted); *see also Barnes*, 536 U.S. at 189-90 & n. 3, 122 S. Ct. 2097. The ADA derives from Congress's power under the Commerce Clause. U.S. Const. art. I, § 8, cl. 3; *see* 42 U.S.C. § 12111(5) ("'employer' means a person engaged in an industry affecting commerce"); *United States* v. *Miss. Dep't of Pub. Safety*, 321 F.3d 495, 500 (5th Cir. 2003) (noting that "the ADA is an exercise of Commerce Clause power").

nancial assistance." 29 U.S.C. § 794(a). The Rehabilitation Act covers any program receiving federal funds. The Act carefully defines "program or activity" as " *all* of the operations of" state instrumentalities, colleges and universities, local education agencies, and "an entire corporation, partnership, or other private organization, or an entire sole proprietorship." 29 U.S.C. § 794(b) (emphasis added). This language has led us to interpret "program or activity broadly." *Sharer* v. *Oregon*, 581 F.3d 1176, 1178 (9th Cir. 2009) (quoting *Haybarger* v. *Lawrence County Adult Prob. & Parole*, 551 F.3d 193, 200 (3d Cir. 2008) (internal quotation marks omitted)). Thus, the Rehabilitation Act covers "all of the operations" of covered entities, not only those related to employment.

By contrast, Title I of the ADA prohibits "discriminat[ion] against a qualified individual * * * because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112. Title I covers all aspects of the employer-employee relationship, but unlike § 504 of the Rehabilitation Act, it does not cover other relationships, which are addressed elsewhere in the ADA. *See Zimmerman* v. *Or. Dep't of Justice*, 170 F.3d 1169, 1172, 1177-78 (9th Cir. 1999).

B

Second, Congress did not use language of incorporation when it referred to the ADA in § 504. Instead, Congress referred to the " *standards* used to determine whether [§ 504] has been violated in a complaint alleging employment discrimination." 29 U.S.C. § 794(d) (emphasis added). We think the

choice of words is significant. The Supreme Court's decision in *Consolidated Rail Corp.* v. *Darrone* is instructive in this regard. Section 505 of the Rehabilitation Act provides that "[t]he remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved * * * by any recipient of Federal assistance * * * under section 794 of this title." 29 U.S.C. § 794a(a)(2). In *Consolidated Rail*, Conrail had refused to employ a locomotive engineer who had become disabled, although it did not find him unfit for employment. The engineer brought suit under § 504. Conrail argued that § 604 of Title VI limited employment discrimination actions to those employers who received federal financial assistance so long as the "primary object of the Federal financial assistance is to provide employment." 42 U.S.C. § 2000d-3; *see* 465 U.S. at 628, 104 S. Ct. 1248. Conrail argued that, because § 504 incorporated Title VI, employment discrimination actions under the Rehabilitation Act were limited to those programs receiving funds "to provide employment" and, since the primary objective of the federal assistance received by Conrail was not to provide employment, the engineer could not bring suit under § 504. The Court rejected Conrail's argument:

> It is clear that § 504 itself contains no such limitation. Section 504 neither refers explicitly to § 604 nor contains analogous limiting language; rather, that section prohibits discrimination against the handicapped under " *any* program or activity receiving Federal financial assistance." And it is unquestionable that the section was intended to reach employment discrimination.

465 U.S. at 632, 104 S. Ct. 1248 (footnote omitted).

The Court in *Consolidated Rail* pointed to two facts: (1) § 504 had a broad definition of covered programs, and (2) although § 504 referred to Title VI, it did not refer "explicitly" to language in § 604 that would have restricted its scope. Similarly, we can find no language in § 504(d) that explicitly adopts those sections of Title I that would restrict the scope of the Rehabilitation Act. When Congress said that the Rehabilitation Act should use the "standards" applicable to employment discrimination claims brought under Title I, we think Congress meant for us to refer to Title I for guidance in determining whether the Rehabilitation Act was violated, but we do not think that Congress meant to restrict the coverage of the Rehabilitation Act.

In *Zimmerman* v. *State Department of Justice*, 170 F.3d 1169 (9th Cir. 1999), we dealt with a similar issue to that presented in *Consolidated Rail* and here: Whether Title II of the ADA, by referring to the Rehabilitation Act, either expressly or impliedly incorporated that act into the ADA. *See* 42 U.S.C. § 12133 (adopting the "remedies, procedures, and rights set forth in section 794a of Title 29"). We held that "Congress' choice to incorporate one section of the Rehabilitation Act, which provides certain procedures, does not demonstrate that Congress also intended to incorporate the rest of the Rehabilitation Act's substance." 170 F.3d at 1179. Following *Zimmerman*'s lead, we decline to hold that because § 504(d) refers to Title I of the ADA, the ADA somehow narrows the scope of § 504(a). As we observed there, under the Rehabilitation Act, "[d]iscrimination is prohibited under any program or activity that receives such [Federal financial] assistance. This fo-

cus naturally encompasses the entire operation of the program or activity, for its federal funding may well flow into compensation for employees," and, we would add, for independent contractors as well. *Id.* at 1181.

C

Third, jot-for-jot incorporation would substantially narrow the scope of the Rehabilitation Act in other ways as well. For example, the ADA's definition of employer, which "means a person engaged in an industry affecting commerce who has 15 or more employees," 42 U.S.C. § 12111(5), would, under Yuma's theory, now govern employment discrimination claims under the Rehabilitation Act. But incorporating that standard would significantly limit the availability of employment discrimination claims under the Rehabilitation Act, a result that seems at odds with Congress's broad definition of "program[s] and activit[ies]" covered by the Rehabilitation Act. 29 U.S.C. § 794(b). Without additional direction from Congress, we are hesitant to reduce the express scope of the Rehabilitation Act by wholesale adoption of definitions from another act. *See Gross* v. *FBL Fin. Servs., Inc.*, --- U.S. ----, 129 S. Ct. 2343, 2349, 174 L.Ed.2d 119 (2009) ("When conducting statutory interpretation, we 'must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination.'" (quoting *Fed. Express Corp.* v. *Holowecki*, 552 U.S. 389, 128 S. Ct. 1147, 1153, 170 L.Ed.2d 10 (2008))). Ironically, if we adopted the district court's and Yuma's position, we would have to conclude that Congress narrowed the Rehabilitation Act by adopting the ADA. That conclusion contradicts the plain import of those acts,

and we decline to go down that road without a clearer indication that Congress wanted us to.

We find the reasoning of the Tenth Circuit persuasive. In *Schrader* v. *Ray*, the issue was whether § 504(d) of the Rehabilitation Act incorporated the ADA's "'fifteen or more employees' definition of employer as a limitation on the definition of entities covered by the Rehabilitation Act." 296 F.3d at 971. Deciding that it did not, the court adopted the reasoning from *Johnson* v. *N.Y. Hospital*, 897 F. Supp. 83 (S.D.N.Y.1995):

> In enacting the 1992 amendment of the Rehabilitation Act, Congress intended that the standard of "reasonable accommodations" that employers must make under the ADA would serve as the standard in actions alleging Rehabilitation Act violations in the employer-employee context * * *. What the amendment does not state is that the standards of the ADA are to be used to determine whether an employer is even subject to the Rehabilitation Act in the first instance.

Schrader, 296 F.3d at 972 (quoting *Johnson*, 897 F. Supp. at 86). The Tenth Circuit concluded that § 504(d) "addresses only the substantive standards for determining *what* conduct violates the Rehabilitation Act, not the definition of *who* is covered under the Rehabilitation Act." 296 F.3d at 972.

Latching on to the word "substantive," Yuma argues that we are bound by the Supreme Court's more recent decision in *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 126 S. Ct. 1235, 163 L.Ed.2d 1097 (2006), in which the Court held that the fifteen-employee qualification in Title VII's definition of employer is "subs-

tantive." Yuma contends that: (1) Section 504(d) incorporates Title I's substantive requirements; (2) *Arbaugh* holds that the definition of "employer" is substantive; (3) therefore, § 504 incorporates Title I's definition of "employer." Yuma's argument has two problems. First, Yuma places undue weight on the term "substantive," a term that does not appear in § 504(d). It is true that other circuits have sensibly described the standards referred to in § 504(d) as "substantive,"[4] but that descriptive term tells us little about the scope of the Rehabilitation Act.

The other problem with Yuma's argument is that it equivocates two meanings of "substantive": substantive as opposed to jurisdictional, and substantive as opposed to procedural. In *Arbaugh*, the Supreme Court examined whether Title VII's definition of "employer" as an entity that employs fifteen or more employees is jurisdictional or a "substantive ingredient of a Title VII claim." 546 U.S. at 503, 126 S. Ct. 1235. The Court concluded that the fifteen-or-more-employees requirement concerns the substantive adequacy of the claim and was not a prerequisite for establishing subject matter jurisdiction. *Id.* at 504, 126 S. Ct. 1235. However, the Supreme Court's conclusion that Title VII's definition of employer is substantive rather than jurisdictional does not force the conclusion that the definition is "substantive" rather

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[4] *See McDonald* v. *Pa. Dep't of Pub. Welfare*, 62 F.3d 92, 95 (3d Cir. 1995) ("Whether suit is filed under the Rehabilitation Act or under the Disabilities Act, the substantive standards for determining liability are the same."); *Myers* v. *Hose*, 50 F.3d 278, 281 (4th Cir. 1995) ("[W]hether suit is filed against a federally-funded entity under the Rehabilitation Act or against a private employer under the ADA, the substantive standards for determining liability are the same.").

than "procedural," or something else. These are different contrast classes.[5] That the Supreme Court determined that the fifteen-employee requirement is a "substantive ingredient" of a Title VII claim does not tell us whether the ADA's definition of employer is part of the ADA's substantive standard for determining when discrimination occurs. *Arbaugh*, therefore, did not address, let alone answer the question before us.

D

Fourth, if we adopted Yuma's reading, there would be substantial duplication between the Rehabilitation Act and the ADA-perhaps inconsistent duplication-in the definitions of key terms. Section 504 refers to 29 U.S.C. § 705(20) for a definition of the term "individual with a disability." Section 705(20) defines that term generally and then creates certain exclusions. It addresses employment in two specific cases. In § 705(20)(C)(v), the Rehabilitation Act provides that "[f]or purposes of [29 U.S.C. §§ 793 and 794] as such sections relate to employment, the term 'individual with a disability' does not include any individual who is an alcoholic" if alcoholism prevents the individual from performing his duties. And § 705(20)(D), for purposes of employment, similarly excludes persons who have a "currently contagious disease or infection" if the disease or infection would "constitute a direct threat to the health or safety" of others. 29 U.S.C. § 705(20)(D).

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[5] As a simple example, one must recognize when seeking directions that right rather than left doesn't necessarily also mean right rather than wrong.

Title I of the ADA has its own provisions relating to "infectious and communicable diseases," 42 U.S.C. § 12113(d), and illegal use of drugs and alcohol, 42 U.S.C. § 12114. If Yuma is correct that Title I is incorporated into the Rehabilitation Act, then either the ADA's exclusions for communicable diseases and illegal use of drugs and alcohol displace the Rehabilitation Act's own exclusions, or we have to harmonize parallel sections. We have not undertaken a side-by-side comparison of the Rehabilitation Act's provisions with those of the ADA in these areas, but the duplication suggests that Congress has established two parallel schemes, which counsels against finding that Congress created one scheme and then displaced it with a second, duplicative scheme.

E

We recognize that our decision puts us in conflict with the Sixth and Eighth Circuits. With all due respect, we do not find their analysis of the Rehabilitation Act persuasive. In contrast to the Tenth Circuit's decision in *Schrader*, the Eighth Circuit held that § 504(d) does incorporate the ADA's employee-employer requirement into the Rehabilitation Act. *Wojewski* v. *Rapid City Reg'l Hosp., Inc.*, 450 F.3d 338, 345 (8th Cir. 2006). Its brief discussion noted: "Given the similarity between Title I and the Rehabilitation Act, absent authority to the contrary, we construe both to apply to an employee-employer relationship and decline [the] appellant's invitation to extend coverage of the Rehabilitation Act to independent contractors." *Id.* In our view, however, there is no need here to "extend" the Rehabilitation Act; its language is broad enough to cover employees and independent contractors alike. In this respect, Title I and § 504 are quite different. Section 504 does not

even mention employment, while Title I deals exclusively with employment. *Zimmerman*, 170 F.3d at 1176-77. We thus do not find the Eighth Circuit's cursory comparison of § 504 and Title I to be persuasive evidence that the Rehabilitation Act excludes independent contractors.[6]

The Sixth Circuit also incorporated, albeit indirectly, the ADA's limitation into the Rehabilitation Act, holding that "individuals who do not otherwise meet the [Title VII] statutory definition of 'employer' cannot be held liable under the Rehabilitation Act's anti-retaliation provision." *Hiler* v. *Brown*, 177 F.3d 542, 547 (6th Cir. 1999). As an initial matter, the Sixth Circuit's decision in *Hiler* is of dubious relevance to this case because the claim in *Hiler* was brought under § 501 of the Rehabilitation Act-not § 504. *See id.* at 545. Additionally, at issue in *Hiler* was whether the Rehabilitation Act created a private cause of action against supervisors in their individual capacities for retaliation. *Id.* at 543. In concluding that it did not, the Sixth Circuit noted that the ADA and Rehabilitation Act "borrowed the definition of 'employer' from Title VII" and therefore if an individual does not meet the Title VII definition of em-

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[6] The district court and Yuma rely on a statement in Justice Scalia's dissent in *PGA Tour* that Title I "does not protect independent contractors." 532 U.S. at 692, 121 S. Ct. 1879 (Scalia, J., dissenting). The statement, of course, is entirely unexceptional. Title I of the ADA is about employment. *See Zimmerman*, 170 F.3d at 1176 ("Title I contains detailed and comprehensive employment provisions"). The question here is whether the Rehabilitation Act's reference to Title I binds the Rehabilitation Act to the same meaning. For the reasons we have described above, we do not think Justice Scalia's bare observation in his dissent in *PGA Tour* informs the discussion.

ployer, he cannot be liable under the Rehabilitation Act's anti-retaliation provision. *Id.* at 546 n. 5, 547. Though *Hiler* states that the Rehabilitation Act borrowed the definition of employer from Title VII, § 504 specifically defines the entities to which it applies, and does not address employers. *See* 29 U.S.C. §§ 705(20), 794(a), (b). In short, *Hiler* does not speak to the issue in the case before us, and to the extent it does, we are not moved by its analysis.

Finally, although we have rejected it, we recognize that there is some force to the position taken by the district court and Yuma and endorsed by the Eighth and Sixth Circuits. Section 504(d) plainly refers us to Title I of the ADA "as such sections relate to employment." We recognize that such language of referral might be read to suggest that Title I was to be incorporated jot-for-jot into employment discrimination actions brought under the Rehabilitation Act. We also acknowledge that jot-for-jot incorporation is in some respects easier to administer than a selective regime. But our own administrative convenience is not a factor in determining what Congress meant, and for the reasons discussed we have concluded that this is not the best reading of the Rehabilitation Act.

IV. CONCLUSION

We hold that § 504 of the Rehabilitation Act is not limited to employers and employees as defined in Title I of the ADA, but rather applies to independent contractors and the entities that hire them. Fleming's disability discrimination claim under § 504 is proper and his action against Yuma may proceed.

REVERSED.

APPENDIX B:
THE DISTRICT COURT'S ORDER

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Dr. Lester Fleming,
Plaintiff,

v.

Yuma Regional Medical Center; Yuma Anesthesia Medical Services,
Defendants.

No. CV 05-3906-PHX-ROS

ORDER

Pending before the Court is Defendant Yuma Anesthesia Medical Services' (YAMS) Motion for Summary Judgment (Doc. #83). For the following reasons, Defendant's Motion is granted.

On October 16, 2006, the Court denied YAMS' Motion to Dismiss, which presented the same argument as YAMS' Motion for Summary Judgment—that Plaintiff's claims under the Rehabilitation Act, the Arizona Civil Rights Act, Americans with Disabilities Act, and Arizona Employment Protection Act fail because Plaintiff was employed by YAMS as an independent contractor and those statutes do not provide relief to independent contractors. At that time, however, the Court concluded that in the light most favorable to Plaintiff, it was unclear whether Plaintiff was an employee of YAMS, or merely an independent contractor. Accordingly, YAMS's Motion to Dismiss was denied.

At this time, however, Plaintiff no longer disputes Defendant's contention that he was an independent contractor, as set forth in his Response to Defendant's Motion for Summary Judgment. Further, Plaintiff does not specifically controvert Defendant's Statement of Facts which alleges that Plaintiff was an independent contractor. Pursuant to Local Rule 56.1, Defendant's Statement of Facts is deemed admitted for purposes of summary judgement. *See* Local Rule 56.1 (stating "[e]ach numbered paragraph of the statement of facts set forth in the moving party's separate statement of facts shall * * * be deemed admitted for purposes of the motion for summary judgment if not specifically controverted by a correspondingly numbered paragraph in the opposing party's separate statement of facts"). Rather, Plaintiff merely maintains that the Rehabilitation Act, 29 U.S.C. § 701 et seq., provides broader protections than the Americans with Disabilities Act which cover his claims against YAMS.

In his Response, Plaintiff provides no argument to controvert Defendant's position that summary judgment should be granted in their favor on Plaintiff's claims under the Arizona Civil Rights Act, Americans with Disabilities Act, and Arizona Employment Protection Act. Since Plaintiff does not dispute that those Acts do not provide relief to independent contractors, summary judgment will be granted in Defendant's favor on counts two, three, four, five, six and seven of Plaintiff's Amended Complaint. *See PGA Tour, Inc.* v. *Martin*, 532 U.S. 661, 692 (2001) (stating that the Americans with Disabilities Act does not provide relief to independent contractors); A.R.S. § 23-1501 (Arizona Employment Protection Act applies to employees, independent contractors never specifically mentioned and Arizona courts have

never applied the Arizona Employment Protection Act to independent contractors); A.R.S. § 41-1461 (defining employee for purposes of the Arizona Civil Rights Act).

Further, Plaintiff's claims under the Rehabilitation Act also fail. The protections of the Rehabilitation Act apply to an employee-employer relationship and do not extend to cover independent contractors. *Wojewski* v. *Rapid City Regional Hosp., Inc.*, 450 F.3d 338, 345 (8th Cir. 2006) (stating that the Americans with Disabilities Act and the Rehabilitation Act are interchangeable in many respects, specifically that the Americans with Disabilities Act requires an employee-employer relationship, and the Rehabilitation Act contemplates the same). Thus, summary judgment is granted in Defendant's favor on Plaintiff's remaining claims (one and two).

Accordingly,

IT IS ORDERED THAT Defendant Yuma Anesthesia Medical Services' (YAMS) Motion for Summary Judgment (Doc. #83) is **GRANTED**. The Clerk of Court shall enter judgment in YAMS favor pursuant to Rule 54(b).

IT IS FURTHER ORDERED THAT Defendant's Motion for Summary Judgment (Doc. #81) and Motion for Ruling are **DENIED AS MOOT**.

DATED this 20th day of July, 2007.

/s/
Roslyn O. Silver
United States District Judge

APPENDIX C: RELEVANT EXCERPTS FROM THE REHABILITATION ACT OF 1973

* * *

29 U.S.C. § 794. Nondiscrimination under Federal grants and programs

(a) *Promulgation of rules and regulations*

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(b) *"Program or activity" defined*

For the purposes of this section, the term "program or activity" means all of the operations of –

(1) (A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2) (A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 7801 of Title 20), system of vocational education, or other school system;

(3) (A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship –

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in

the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance.

(c) *Significant structural alterations by small providers*

Small providers are not required by subsection (a) of this section to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services are available. The terms used in this subsection shall be construed with reference to the regulations existing on March 22, 1988.

(d) *Standards used in determining violation of section*

The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under Title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201 to 12204 and 12210), as such sections relate to employment.

29 U.S.C. § 794a. Remedies and attorneys fees.

(a)(2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.) (and in subsection (e)(3) of section 706 of such Act (42 U.S.C. 2000e-5), applied to claims of discrimination in compensation) shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

(b) In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

APPENDIX D: RELEVANT EXCERPTS FROM THE AMERICANS WITH DISABILITIES ACT OF 1990

* * *

42 U.S.C. § 12111. Definitions.

As used in this subchapter:

* * *

(2) *Covered entity*

The term "covered entity" means an employer, employment agency, labor organization, or joint labor-management committee.

* * *

(4) *Employee*

The term "employee" means an individual employed by an employer. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(5) *Employer*

(A) *In general*

The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or pre-

ceding calendar year, and any agent of such person, except that, for two years following the effective date of this subchapter, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

* * *

(8) *Qualified individual*

The term "qualified individual" means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

* * *

42 U.S.C. § 12112. Discrimination

(a) *General rule*

No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation,

job training, and other terms, conditions, and privileges of employment.

(b) *Construction*

As used in subsection (a) of this section, the term "discriminate against a qualified individual on the basis of disability" includes--

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration –

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5) (A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to

ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

(c) *Covered entities in foreign countries*

(1) *In general*

It shall not be unlawful under this section for a covered entity to take any action that constitutes discrimination under this section with respect to an employee in a workplace in a foreign country if compliance with this section would cause such covered entity to violate the law of the foreign country in which such workplace is located.

(2) *Control of corporation*

(A) *Presumption*

If an employer controls a corporation whose place of incorporation is a foreign country, any practice that constitutes discrimination under this section and is engaged in by such corporation shall be presumed to be engaged in by such employer.

(B) *Exception*

This section shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

(C) *Determination*

For purposes of this paragraph, the determination of whether an employer controls a corporation shall be based on--

(i) the interrelation of operations;

(ii) the common management;

(iii) the centralized control of labor relations; and

(iv) the common ownership or financial control,

of the employer and the corporation.

(d) *Medical examinations and inquiries*

(1) *In general*

The prohibition against discrimination as referred to in subsection (a) of this section shall include medical examinations and inquiries.

(2) *Preemployment*

(A) *Prohibited examination or inquiry*

Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

(B) *Acceptable inquiry*

A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions.

(3) *Employment entrance examination*

A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if –

(A) all entering employees are subjected to such an examination regardless of disability;

(B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files

and is treated as a confidential medical record, except that--

(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) government officials investigating compliance with this chapter shall be provided relevant information on request; and

(C) the results of such examination are used only in accordance with this subchapter.

(4) *Examination and inquiry*

(A) *Prohibited examinations and inquiries*

A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

(B) *Acceptable examinations and inquiries*

A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

(C) *Requirement*

Information obtained under subparagraph (B) regarding the medical condition or history of any employee are subject to the requirements of subparagraphs (B) and (C) of paragraph (3).

No. 09-1146

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In The
Supreme Court of the United States

YUMA ANESTHESIA MEDICAL SERVICES LLC,

Petitioner,

v.

LESTER FLEMING, M.D.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTION PRESENTED

Is Section 504(d) of the Rehabilitation Act of 1973, 29 U.S.C. § 794(d) (2006), applicable to an independent contractor's disability discrimination claim under Section 504(a), and, if it is, does it exclude an independent contractor from Section 504's otherwise comprehensive protection against disability discrimination in the workplace?

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STATEMENT OF THE CASE

This case presents the narrow question whether Section 504 of the Rehabilitation Act of 1973 protects independent contractors from disability discrimination in the workplace. In a unanimous decision by Judge Bybee, the Ninth Circuit concluded that it does. The court's decision is faithful to the text and legislative history of Section 504, including its amendment in 1992. It also upholds the statute's central purpose of ensuring that federal monies not be used to finance discrimination against qualified people with disabilities.

The only appellate decision to the contrary is cursory and devoid of analysis, and later rulings by the same court call the decision into question. Furthermore, the decision below will affect few people other than the present litigants because suits by independent contractors under Section 504 are rare. Finally, the decision below is correct, for the reasons stated by the court of appeals and for other reasons. Conversely, petitioners' reading of the statute would lead to incongruous results that would undermine the statute's primary purpose. This Court's review is thus not needed.

A. Factual Background

Dr. Lester Fleming is a licensed anesthesiologist. He has sickle-cell anemia, an inherited, chronic

disease that affects roughly 70,000 to 100,000 Americans, mainly African Americans.[1] Despite his disease, Dr. Fleming graduated from medical school in the standard four years, and then completed a four-year residency in anesthesiology. 1st Am. Compl. ¶ 7, App. 3. During his entire medical education and residency, Dr. Fleming neither requested nor received a single accommodation or any other special treatment on account of his disease. *Id.* ¶ 9, App. 4. Thus, contrary to petitioner's intimation, Pet. 12 n.2, sickle-cell anemia has not "severely limit[ed]" Dr. Fleming's daily activities.

Toward the end of his residency in 2005, Dr. Fleming applied for a position as an anesthesiologist with petitioner, Yuma Anesthesia Medical Services ("YAMS"). 1st Am. Compl. ¶ 10, App. 4. YAMS' doctors provide anesthesiology services at the Yuma Regional Medical Center ("Medical Center"). On his job application, Dr. Fleming truthfully answered "Yes" when asked whether he was "able to perform all the procedures for which [he had] requested privileges, with or without reasonable accommodation." Application for Medical Staff Appointment at: Yuma Regional Medical Center 7 (July 6, 2005, received July 15, 2005)

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[1] The main symptom of the disease is occasional pain throughout the body. Most people with sickle-cell anemia manage their pain and lead productive lives. *See generally* Nat'l Heart, Lung, & Blood Inst., Dep't of Health & Human Servs., *Sickle-Cell Anemia: Key Points*, http://www.nhlbi.nih.gov/health/dci/Diseases/Sca/SCA_Summary.html.

(YRMC000091).[2] The form required applicants requesting accommodation to attach a page with additional information. Dr. Fleming submitted his application without requesting any such accommodation.

YAMS offered Dr. Fleming the anesthesiologist position. 1st Am. Compl. ¶ 11, App. 4. The parties executed a medical services agreement in May 2005, in which they agreed that Dr. Fleming would begin work on October 3 of that year. *Id.* In reliance on this agreement, Dr. Fleming applied for and received his license to practice anesthesiology in Arizona and prepared to move to Yuma.

During the Medical Center's process of verifying Dr. Fleming's credentials, YAMS learned that he had sickle-cell anemia. 1st Am. Compl. ¶¶ 12, 15, App. 5-6. Although Dr. Fleming explained that he had never required any accommodation during his medical education, a YAMS partner told Dr. Fleming to cancel his move to Arizona, and YAMS' acting chairman advised him to seek alternative employment. *Id.* ¶¶ 12, 14, 16, App. 5-6.

Four weeks after Dr. Fleming's agreed-upon start date, YAMS still would not let Dr. Fleming begin

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[2] The application did not ask Dr. Fleming "to disclose if he had any medical conditions that would affect his ability to practice medicine . . . ." Pet. 13. Petitioner's paraphrasing of the application's question creates the false impression that Dr. Fleming was not candid in his job application.

work unless he signed an addendum to the original agreement. The proposed addendum stipulated that YAMS would not provide any "reasonable accommodations" if Dr. Fleming was ever unable to adhere to his operating-room or on-call schedules. *Id.* ¶ 20, App. 7. Dr. Fleming declined to sign this addendum, and YAMS refused to honor the original agreement. *Id.* ¶ 21, App. 8. While YAMS represents that Dr. Fleming "unilaterally terminated" their agreement, Pet. 13, Dr. Fleming alleges that YAMS unlawfully discharged him or failed to honor its commitment to hire him, on account of its perception that he was disabled. The lower courts have not yet resolved this disagreement.

B. Statutory Framework

1. Congress originally enacted the Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355, to "establish[ ] a comprehensive federal program aimed at improving the lot of the handicapped." *Consol. Rail Corp.* v. *Darrone*, 465 U.S. 624, 626 (1984). As Congress later reaffirmed, the Act's purpose was to "empower individuals with disabilities to maximize employment" and their "inclusion and integration into society." 29 U.S.C. § 701(b)(1) (2006). To that end, Congress created federal programs, state-operated vocational-rehabilitation services, and, in the core provision of Section 504(a), "the first federal civil

rights law generally prohibiting discrimination against individuals with disabilities."[3]

Modeled on Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (2006), Section 504(a) is aimed at ensuring that federal monies not be used to finance discrimination. The statutory protection of otherwise qualified individuals is broad and comprehensive. It protects *all* qualified individuals from disability-based discrimination by entities that receive federal funding. Section 504(a) provides:

> *No* otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under *any* program or activity receiving Federal financial assistance . . . .

29 U.S.C. § 794(a) (2006) (emphases added).

One of the statutory definitions of an "individual with a disability" is someone whose impairment "constitutes or results in a substantial impediment to employment." 29 U.S.C. § 705(20)(A) (2006).[4] As this

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[3] Cong. Research Serv., Report RL34041, *Section 504 of the Rehabilitation Act of 1973: Prohibiting Discrimination Against Individuals with Disabilities in Programs or Activities Receiving Federal Assistance* (2009).

[4] The statute originally referred to a "handicapped individual," defined as anyone whose "handicap" constituted a substantial "handicap to employment." Pub. L. No. 93-112, § 7(6), 87

(Continued on following page)

Court has noted, however, "enhancing employment of the handicapped was so much the focus of the 1973 legislation" that Congress "the next year felt it necessary to amend the statute" to clarify that "§ 504 was intended to prohibit other types of discrimination as well." *Darrone*, 465 U.S. at 632. As the Senate Committee Report explained, Section 504 "was not to be narrowly limited to employment." S. Rep. No. 93-1297, at 6388 (1974).

The 1974 amendment extended the definition of "individual with a disability" to anyone who "(i) has a physical or mental impairment which substantially limits one or more of such person's major life activities; (ii) has a record of such an impairment; or (iii) is regarded as having such an impairment." Pub. L. 93-516, § 111(a), 88 Stat. 1617, 1619 (1974) (codified at 29 U.S.C. § 705(20)(B) (2006)).[5] Thus, Congress ensured that Section 504 would provide the same protection from discrimination to employees and other "qualified individuals" in any program or activity – workplace or otherwise – that receives federal funding.[6]

Stat. 355, 361 (1973). This language was replaced with the current definition in 1992. Pub. L. No. 102-569, § 102(f), 106 Stat. 4344, 4348 (1992).

[5] Congress further amended the Rehabilitation Act in 2008. Section 705(20)(B) now incorporates the virtually identical definition in the ADA. 29 U.S.C. § 705(20)(B) (incorporating 42 U.S.C. § 12102 (2006)).

[6] Subject to certain qualifications, the statute excludes from its definition of "individual with a disability" anyone currently engaged in the illegal use of drugs or the abuse of alcohol,

(Continued on following page)

2. Section 504's limitation to entities receiving federal funds "was one of the primary constraints of the Act that advocates felt necessitated the passage of a broader statute." Katie Eyer, *Rehabilitation Act Redux*, 23 Yale L. & Pol'y Rev. 271, 282 (2005). In 1990, therefore, Congress enacted the Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 ("ADA"). While it based much of the substance of the ADA on Section 504 and regulations issued under it,[7] Congress applied the anti-discrimination mandate of the ADA to private employers regardless of federal funding.

Thus, Title I of the ADA forbids employment discrimination against "employee[s]" by "employer[s]" who are "engaged in an industry affecting commerce" and who have "15 or more employees." 42 U.S.C. §§ 12111(2), (5), 12112(a). Title I deals exclusively with employment – that is, interactions between employers and employees. These aspects of Title I were deliberate departures from Section 504, which is not limited to employment and which covers *all* qualified individuals with disabilities and *all* recipients of federal financial assistance. As petitioner notes, the two statutes' "respective scopes, although overlapping, are not coextensive." Pet. 10 n.1. While some entities are

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individuals with contagious or infectious diseases, and individuals who meet certain other specific criteria. 29 U.S.C. §§ 705(20)(C), (D), & (E).

[7] *See* 42 U.S.C. § 12201 (2006); *Bragdon* v. *Abbott*, 524 U.S. 624, 646-47 (1998).

subject to just one of the two statutes, many others are subject to both Section 504 and Title I.[8]

In enacting the ADA, Congress expressly directed that it not be interpreted in a manner that would undermine any of Section 504's protections, stating:

> [N]othing in [the ADA] shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act or . . . to *invalidate or limit* the remedies, rights, and procedures of any Federal law . . . that provides greater or equal protection for the rights of individuals with disabilities . . . .

42 U.S.C. § 12201(a), (b) (emphasis added). In short, Congress intended the ADA to supplement Section 504, not to supplant it.[9]

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[8] YAMS maintains that it is not an "employer" under Title I of the ADA because it is composed of members and independent contractors and has no employees. Memorandum in Support of Yuma Anesthesia Medical Services' Motion for Summary Judgment, *Fleming* v. *Yuma Reg'l Med. Ctr.*, No. Civ. 05-3906 (D. Ariz. Apr. 27, 2007), at 3. As a recipient of Medicare and Medicaid funds, YAMS is subject to Section 504. *See United States* v. *Baylor Univ. Med. Ctr.*, 736 F.2d 1039, 1042, 1046 (5th Cir. 1984).

[9] Petitioner says "the courts of appeals have generally treat[ed] [Title I and Section 504] as 'twin statutes' with regard to employment discrimination suits." Pet. 11 (citing *Garcia* v. *S.U.N.Y. Health Sci. Ctr.*, 280 F.3d 98, 113 n.3 (2d Cir. 2001)). The Second Circuit described the two statutes as "twin[s]," however, only insofar as they "impose identical *obligations* upon employers." *Garcia*, 280 F.3d at 113 n.3 (emphasis added) (internal quotation marks omitted). The statutes are not "twin[s]"

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3. The enactment of the ADA spawned a huge amount of litigation, which dwarfed previous litigation under Section 504.[10] The law of workplace disability discrimination developed more rapidly and extensively under Title I of the ADA than it had under Section 504 – and not always consistently.[11]

Congress responded in 1992 by enacting Section 504(d), which applies to the subset of Section 504(a) cases that involve "employment discrimination." Section 504(d) provides: "The *standards* used to determine whether . . . section [504(a)] has been *violated* in a complaint alleging employment discrimination . . . shall be the *standards* applied under title I of the Americans with Disabilities Act . . . ." 29 U.S.C. § 794(d) (emphases added). The purpose of Section 504(d) was to "ensure uniformity and consistency of interpretations" as to what conduct would violate both Section 504 and Title I. S. Rep. No. 102-357, at 71 (1992). Senator Harkin, the amendment's principal sponsor, explained: "Now those who are covered by title V of the Rehabilitation Act will know that these are the

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with regard to their scope of coverage, and only Title I, not Section 504, is addressed exclusively to "employers."

[10] Steven Epstein, *In Search of a Bright Line: Determining When an Employer's Financial Hardship Becomes "Undue" Under the Americans with Disabilities Act*, 48 Vand. L. Rev. 391, 433 (1995).

[11] Sam Silverman, *The ADA Interactive Process: The Employer and Employee's Duty to Work Together to Identify a Reasonable Accommodation Is More Than a Game of Five Card Stud*, 77 Neb. L. Rev. 281, 281 (1998).

definitions of *reasonable accommodation* and *discrimination* that apply." 138 Cong. Rec. 31,523 (1992) (emphases added).

Subsection (d) thus specifies substantive standards for resolving the subset of Section 504(a) claims that allege "employment discrimination." It has no impact on Section 504(a) claims that allege other kinds of discrimination, including workplace discrimination not involving "employers" and "employees." These claims are outside the purview of Section 504(d) and simply proceed under the general provision of Section 504(a).[12]

C. Judicial Proceedings

1. Dr. Fleming sued YAMS in the U.S. District Court for the District of Arizona.[13] Among other claims, the complaint alleged that YAMS violated Section 504 when it "learned that Dr. Fleming had sickle cell disease" and "refused to hire" him. 1st Am.

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[12] Section 504 does not contemplate "two categories of enforcement actions – those 'alleging employment discrimination' (29 U.S.C. § 794(d)) and all others." Pet. 5. All discrimination complaints are brought under Section 504(a). Section 504(d) does not provide a separate right or cause of action; it merely directs courts to apply the "standards" of Title I to a particular subset of Section 504(a) complaints.

[13] Dr. Fleming also named the Medical Center as a defendant, but they have settled their dispute. *See* Brief for Appellant, *Fleming* v. *Yuma Reg'l Med. Ctr.*, 587 F.3d 938 (9th Cir. 2009) (No. 07-16427), at 7 n.1.

Compl. ¶¶ 33, 34, App. 10. The complaint also alleged that "YAMS perceived Dr. Fleming as being substantially limited in one or more major life activities including, but not limited to, working, as defined by Section 504." *Id.* ¶ 22, App. 8. This, of course, tracks the definition of an "individual with a disability" under Section 705(20)(B). Dr. Fleming did not allege that he has a disability that is a substantial "impediment to employment" (under Section 705(20)(A)).

YAMS moved to dismiss the complaint. With respect to Dr. Fleming's Section 504 claim, YAMS argued that Title I of the ADA protects only employees, not independent contractors; that Section 504(d) makes the "standards" of Title I applicable to Section 504 complaints alleging "employment discrimination"; and therefore that Section 504(d) excludes independent contractors from the coverage of Section 504. The district court denied this motion so that the parties could conduct discovery as to whether Dr. Fleming was to have been YAMS' employee or an independent contractor.

After discovery, Dr. Fleming acknowledged that he was an independent contractor, and the district court granted YAMS' motion for summary judgment. It stated, without elaboration, that the protections of Section 504 "apply to an employee-employer relationship and do not extend to cover independent contractors." Pet. App. 19a.

2. Dr. Fleming appealed to the U.S. Court of Appeals for the Ninth Circuit, which unanimously

reversed. *Fleming* v. *Yuma Regional Med. Ctr.*, 587 F.3d 938 (9th Cir. 2009). In an opinion by Judge Bybee, the court concluded that Section 504 protects a broader class of disabled individuals than the ADA does, and covers "'all of the operations' of covered entities, not only those related to employment." *Id.* at 941-42, Pet. App. 6a-7a. The court held that Section 504 "is not limited to employers and employees as defined in Title I of the ADA, but rather applies to independent contractors and the entities that hire them." *Id.* at 946, Pet. App. 16a. The court also ruled that the ADA "standards" to which Section 504(d) refers are those for determining *what* conduct is prohibited, not *who* is covered. *Id.* at 944-45, Pet. App. 11a.

The Ninth Circuit declined to follow an Eighth Circuit decision holding that Section 504 covers only employees. That decision contained only a "brief" and "cursory" treatment of the coverage of Section 504 and no discussion of Section 504(d). *Id.* at 945, Pet. App. 14a-15a (discussing *Wojewski* v. *Rapid City Reg'l Hosp., Inc.*, 450 F.3d 338 (8th Cir. 2006)). Similarly, the court regarded the Sixth Circuit's decision in *Hiler* v. *Brown*, 177 F.3d 542 (6th Cir. 1999) – which did not concern an independent contractor, or Section 504, or Title I of the ADA – as "of dubious relevance to this case." *Id.* at 946; Pet. App. 15a-16a.

Accordingly, the court held that Dr. Fleming's "disability discrimination claim under § 504 . . . and

his action against [YAMS] may proceed." *Id.* at 946, Pet. App. 16a.

ARGUMENT

Nothing about the decision below warrants this Court's review. The circuit courts are not "deeply divided" on the question presented. Pet. 1, 17. There is at best a possible conflict between the court below and only one other court of appeals decision. This shallow and recent disagreement should not concern this Court, since the Eighth Circuit reached its conflicting decision "absent authority to the contrary," and later decisions cast doubt on the continued vitality of that decision. Other courts – including the Eighth Circuit – now have the benefit of the Ninth Circuit's analysis, and likely will resolve the conflict themselves.

Petitioner also overstates the scope and importance of the issue. Resolving the question presented will not "define the obligations that recipients of federal funds owe disabled individuals." Pet. 1. It will simply decide whether Section 504(d) silently revoked the rights of an independent contractor like Dr. Fleming under Section 504(a). The substantive content of the statute's protection is not at issue here. Moreover, suits under Section 504 are rare, and such suits by independent contractors even rarer.

Finally, the interlocutory decision below is manifestly correct, based on the statute's text, legislative

history, policy, and logic. In short, this Court's review is not warranted.

I. The Circuit Split Is Shallow and Immature, and May Well Resolve Itself

A. Any Conflict Is Limited to Two Circuits

1. In two of the cases cited by petitioner, there was no question that the plaintiff was entitled to bring suit under Section 504. Rather, the defendants in those cases argued that *they* were outside the statute's purview.

a. The Tenth Circuit's decision in *Schrader* v. *Ray*, 296 F.3d 968 (10th Cir. 2002), raised no question about an independent contractor's rights under Section 504. It was undisputed that the plaintiff in *Schrader* was an employee of a federal-funds recipient, but the employer had fewer than fifteen employees and therefore was not covered by Title I of the ADA. Absent Section 504(d), with its reference to Title I, there would have been no doubt that the employer was subject to Section 504(a). The question, therefore, was whether Section 504(d) cut back on the scope of Section 504 and relieved the employer of its nondiscrimination obligation.

The Department of Justice, which is responsible for coordinating enforcement of both Section 504 and

the ADA,[14] submitted an amicus brief in *Schrader*. It emphasized the intentional differences in scope of the two statutes, and explained that Section 504(d)'s reference to Title I's "standards" did not in any way limit Section 504's coverage of *all* entities that receive federal funds. Brief for the United States as Amicus Curiae, *Schrader* v. *Ray*, at 7 (10th Cir. 2002) (No. 00-5224), http://www.justice.gov/crt/briefs/schrader.pdf ("*Schrader* Amicus Br"). The Tenth Circuit agreed, holding that "§ 504(d) addresses only the substantive standards for determining *what* conduct violates the Rehabilitation Act, not the definition of *who* is covered." 296 F.3d at 972.

The Tenth Circuit did not have before it, and did not decide, the question of an independent contractor's rights – or the rights of any particular type of plaintiff – under Section 504. The Justice Department's amicus brief and the Tenth Circuit's reasoning are consistent with the Ninth Circuit's opinion in this case, but the courts' holdings are on distinct questions.

b. Petitioner asserts no real conflict with *Hiler* v. *Brown*, 177 F.3d 542 (6th Cir. 1999), but only that that decision is "in substantial tension" with the decision below. Pet. 16. In fact, there is no tension. *Hiler* had nothing to do with independent contractors, Section 504(a) or (d), or Title I. The Ninth Circuit

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[14] Executive Order No. 12,250, 3 C.F.R. 298 (1981).

correctly stated that *Hiler* "does not speak to the issue" in this case. 587 F.3d at 946, Pet. App. 16a.

In *Hiler*, a government employee sued his supervisors in their individual capacities for retaliation under Section 501 of the Rehabilitation Act and Title VII of the Civil Rights Act, whose "remedies, procedures, and rights" are the vehicle for private actions under Section 501. *Hiler*, 177 F.3d at 545 (quoting 29 U.S.C. § 794a(a)(1)). The Sixth Circuit noted that supervisors are not included in Title VII's definition of "employer." Since "[t]he enforcement provisions of Title VII permit civil actions against an 'employer,' . . . individuals who are not employers under Title VII cannot be held personally liable" under Section 501. *Id.* at 545-46.

Hiler has no bearing on whether an independent contractor can sue a recipient of federal funds covered by Section 504. The *Hiler* court limited suits under Section 501 to employers because Title VII is so limited, not because of Title I of the ADA. Suits under Section 504, however, are governed not by Title VII, but by Title VI. *Compare* 29 U.S.C. § 794a(a)(1) *with id.* § 794a(a)(2). Both Section 504(a) and Title VI cover "any program or activity" that receives federal funds. The definition of "employer" does not come into play. Moreover, *Hiler* says nothing about proper plaintiffs in suits under Section 501, much less under Section 504. As the court below noted, the Sixth Circuit was deciding a different issue, so *Hiler* is "of dubious relevance to this case." 587 F.3d at 946, Pet. App. 15a.

Understandably, the Sixth Circuit did not mention Section 504(d) in *Hiler*. In a later case, however, that court recognized that under Section 504(d), it is the "substantive standards of the ADA" and its "legal analysis of [a plaintiff's] claims" that are brought to bear on employment discrimination claims under the Rehabilitation Act. *Plautz* v. *Potter*, 156 F. App'x 812, 816 (6th Cir. 2005) (unpublished per curiam). There is thus no indication that the Sixth Circuit would rule any differently than the court below on a suit by an independent contractor under Section 504(a).[15]

2. Both the D.C. Circuit's decision in *Redd* v. *Summers*, 232 F.3d 933 (D.C. Cir. 2000), and the Idaho Supreme Court's decision in *Levinger* v. *Mercy Med. Ctr.*, 75 P.3d 1202 (Idaho 2003), are factually distinguishable from this case. Neither involved a suit against the entity that had hired the plaintiff. Neither party mentioned *Redd* in the courts below, and the Ninth Circuit did not address either *Redd* or *Levinger* in its opinion. Nevertheless, both decisions actually support Dr. Fleming's right to sue under Section 504(a).

a. The plaintiff in *Redd* sued the Bureau of Engraving and Printing (the "Bureau") under Sections

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[15] The anti-retaliation provision of Title V of the ADA, 42 U.S.C. § 12203(a), which the Sixth Circuit applied in *Hiler*, presumably is the kind of substantive "standard" that the Ninth Circuit would consider applicable to an employment discrimination suit under Section 504, "for proving when discrimination in the workplace is actionable." 587 F.3d at 939, App. 2a.

501 and 504. She had been fired from her job with a company that provided tour guides to the Bureau. The parties agreed that Section 501 applied "only to disability discrimination in federal government *employment*." 232 F.3d at 937 (emphasis added). The D.C. Circuit held that Redd could not sue the Bureau under Section 501 because she had not been its employee. *Id.* at 936.[16]

The more relevant part of the D.C. Circuit's opinion is its holding that Redd could pursue her claim against the Bureau under Section 504. The fact "that the Bureau was not her employer . . . sheds no light on th[e] question" of Redd's rights under Section 504. *Id.* at 941. Because the "Bureau's tour guide contract may constitute a federal program or activity, in which . . . Redd [was] entitled to show . . . she was unlawfully denied participation," the court held that Redd's Section 504 claim against the Bureau could proceed. *Id.* The D.C. Circuit did not even mention Section 504(d) as a possible bar to Redd's suit.

While petitioner asserts that differences between Sections 501 and 504 are "immaterial," Pet. 22 n.7, those differences were critical in *Redd*. With respect to Section 504, *Redd* is in accord with the Ninth Circuit's decision in this case.

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[16] While the court briefly mentioned that Section 501(g) makes Title I's standards applicable to suits under Section 501, it did not discuss or rely on Section 501(g) in affirming the grant of summary judgment on Redd's Section 501 claim. *Compare* 232 F.3d at 936 *with id.* at 941.

b. *Levinger* likewise does not conflict with the decision below. Dr. Levinger was an independent contractor for a medical group that provided doctors' services to a local hospital. 75 P.3d at 1204. But the Idaho Supreme Court's decision was not about Dr. Levinger's suit against the *medical group*; it concerned his suit against the *hospital*. Since Dr. Levinger was hired by the group, which in turn provided services to the hospital, the doctor was neither an employee nor an independent contractor of the hospital. *Id.* at 1204-05. The court therefore concluded that Dr. Levinger could not "proceed with his *employment discrimination* claims" against the hospital. *Id.* at 1206 (emphasis added).

The court's addition of the phrase "since he is an independent contractor," *id.* at 1204, is neither necessary to the decision nor relevant to whether an independent contractor can sue the entity that hired him. The court would have reached the same conclusion had Dr. Levinger been an employee of the medical group. The court's holding therefore does not conflict with the Ninth Circuit's in this case.[17]

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[17] Neither party's brief in *Levinger*, in the trial court or the Idaho Supreme Court, questioned whether independent contractors may sue under Section 504. The Idaho Supreme Court cited nothing in support of its *sua sponte* dictum other than Justice Scalia's comment in dissent that Title I does not cover independent contractors. 75 P.3d at 1208 (citing *PGA Tour, Inc.* v. *Martin*, 532 U.S. 661, 692 (2001) (Scalia, J., dissenting)). Justice Scalia's statement, however, said nothing about Section 504.

More importantly, the Idaho Supreme Court approved of the trial court's decision to allow the jury to consider Dr. Levinger's Section 504 claim to the extent that it did not allege "employment discrimination." Understanding that phrase to mean only discrimination by an employer against its employee, the court held that the trial court properly allowed Levinger to pursue his claim that the hospital "violated the Rehabilitation Act . . . by regarding Levinger as being disabled and denying him hospital privileges." *Id.* at 1209.

The ruling in *Levinger*, like the ruling in *Redd*, accords with the Ninth Circuit's holding in this case. Neither the D.C. Circuit nor the Idaho Supreme Court considered Section 504(d) a bar to "Rehabilitation Act . . . claims for other than employment discrimination." *Id.* Both courts allowed the suits by non-employees to proceed under Section 504.

3. The only appellate decision whose result actually conflicts with the result below is the Eighth Circuit's decision in *Wojewski*. That cursory, conclusory decision's continued vitality is doubtful, however, in light of later Eighth Circuit decisions.

Dr. Wojewski, a cardiothoracic surgeon with bipolar disorder, had his hospital privileges revoked after he suffered an acute manic episode while performing open-heart surgery. He then sued the hospital under Section 504 and Title I of the ADA. The district court dismissed the suit on the ground that

the doctor was an independent contractor rather than the hospital's employee.

The Eighth Circuit affirmed. It agreed that Title I of the ADA did not cover Dr. Wojewski because he was an independent contractor. In addressing the doctor's Rehabilitation Act claim, the court merely said: "Given the similarity between Title I and the Rehabilitation Act, absent authority to the contrary, we construe both to apply to an employee-employer relationship." 450 F.3d at 345. The court believed that affording rights to an independent contractor would "extend" the Rehabilitation Act's coverage. *Id.* The Eighth Circuit's decision rested on its incorrect understanding of the scope of Section 504 generally – an understanding that petitioner neither defends nor advocates. The court did not mention or rely on Section 504(d).

As petitioner acknowledges, the Eighth Circuit has not adhered to *Wojewski*'s narrow reading of Section 504. *See* Pet. 20 n.6 (citing *M.P. ex rel. K. & D.P.* v. *Indep. Sch. Dist. No. 721*, 439 F.3d 865, 868 (8th Cir. 2006) (applying Section 504 to a student's claim against his school)). Furthermore, while *Wojewski*'s result may conflict with the result in this case, its opinion does not address the same question of statutory interpretation. In a later decision actually addressing the incorporation of the ADA's standards, the Eighth Circuit expressed an understanding consistent with the Ninth Circuit's in this case. *See*

Lewis v. *Johanns*, 180 F. App'x 599, 601 (8th Cir. 2006) (unpublished per curiam).[18]

The Eighth Circuit would almost certainly reconsider the independent contractor issue if faced with it again, in light of its later decisions and the Ninth Circuit's statutory analysis in this case. Therefore, the courts of appeals will likely resolve any conflict themselves, without this Court's intervention.

B. This Shallow Disagreement Is Immature and Undeveloped

This limited 1-1 conflict in the lower courts falls far short of the "widespread," "deep and intractable" conflict that petitioner describes. Pet. 31, 17. Only two courts have addressed the question presented. Only the decision below rests on settled law concerning the scope of Section 504(a) and a reasoned

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[18] In *Lewis*, the court noted that the lower court had incorrectly referred to the ADA, rather than the Rehabilitation Act, in a Rehabilitation Act suit against the United States Department of Agriculture. The United States is explicitly excluded from the ADA's definition of "employer." 180 F. App'x at 601. The Eighth Circuit excused the error because "the same basic standards and definitions are used" under both statutes. *Id.* The court did *not* hold that the United States could not be sued, which would have been the necessary conclusion from petitioner's interpretation of the statute. Thus, the Eighth Circuit evinced an understanding that Sections 504(d) and 501(g) incorporate Title I's substantive standards but not its scope. *See infra* p. 37 n.35.

analysis of the relationship between that section and Section 504(d).

Petitioner's claim that there is a "long-standing and ever-deepening" conflict in the circuits, Pet. 4, is also an exaggeration. *Wojewski* was decided in 2006 – twenty-three years after Congress enacted Section 504. The Ninth Circuit's decision in this case, three years after *Wojewski* and within the past year, is the first decision to disagree with *Wojewski*. Thus, any conflict has just emerged; it is far from "long-standing and ever-deepening."[19]

Moreover, the opinions cited by petitioner are diffuse and confusing. The few extant opinions rarely even address the same statutory provisions or arguments. There are contradictions in the decisions of a particular court or even within a decision. *See* Pet. 23 n.8 (claiming that there is "apparent confusion" and internal "inconsisten[cy]" in the D.C. Circuit's opinion in *Redd*).

Under the circumstances, it would be best to let these issues percolate in the circuit courts, so that any divergence in views can either come into sharper focus or be resolved by the lower courts.

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[19] In the district court, petitioner maintained that there was no previous disagreement on this issue. Reply in Support of Yuma Anesthesia Medical Services' Motion for Summary Judgment, *Fleming* v. *Yuma Reg'l Med. Ctr.*, No. Civ. 05-3906 (D. Ariz. July 3, 2007), at 4.

II. Petitioner Overstates the Importance of the Issue

A. Petitioner Inflates the Apparent Importance of This Case by Raising Questions Not Before This Court

The narrow question presented is whether an independent contractor may enforce his rights under Section 504(a). This is the issue decided by the courts below; it is the question presented by petitioner; and it is the only question properly before this Court.

To inflate the apparent importance of this case, petitioner alludes to several broader questions about Title I and Section 504. For example, petitioner asks this Court to "define the obligations that recipients of federal funds owe disabled individuals," as well as "the legal standards that govern suits alleging the violation of those obligations." Pet. 1. These queries lead to other, more specific questions, such as whether a claimant under Section 504 must show that his disability was the "sole cause" of the defendant's conduct, or just a "motivating factor." Pet. 4, 17, 27. As petitioner acknowledges, this latter issue is itself the subject of another circuit split, involving other issues not including independent contractors' rights. Pet. 27-28 n.10 (citing conflicting First and Fifth Circuit decisions).

These and other potential issues of statutory interpretation, however, are not encompassed by the question presented and are not properly before this Court. There has been no trial or appellate review

during which any of the respective statutory standards would have been explicated or applied. The parties have not briefed these issues in the courts below, and neither court has ruled on them. Because of the interlocutory posture of this case, there is no way to know which of these issues may arise at trial or how they will be resolved.

This Court doubtless would not address these discrete issues without the benefit of their full development and adjudication in the courts below. They are therefore not relevant to this Court's assessment of whether to grant review.

B. Suits Under Section 504 Are Rare, and Such Suits by Independent Contractors Are Even Rarer

Section 504 applies to fewer entities and protects fewer individuals than Title I of the ADA does. Not surprisingly, there are far fewer suits under Section 504 than under Title I, which has generated an enormous amount of litigation and case law.[20] During its first seventeen years, only 265 lawsuits were filed under Section 504. By contrast, Title I generated an immediate explosion of litigation – 30,000 charges of discrimination were filed during its first two years.[21]

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[20] Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 Berkeley J. Emp. & Lab. L. 19, 21 n.20 (2000).

[21] Epstein, *supra* n.10, at 433; *see also* Michael Selmi, *Interpreting the Americans with Disabilities Act: Why the Supreme*

(Continued on following page)

After passage of the ADA, Section 504 became even less important than before, particularly as a vehicle for workplace discrimination suits. The statute simply has not "produce[d] a substantial body of case law." Selmi, *supra* n.21, at 535.

This case's lack of general importance becomes even clearer if one focuses on the number of Section 504 suits brought specifically by independent contractors. Petitioner identifies five decided cases. Pet. 20 n.5. Even if there are others, a handful of cases over several decades does not suggest a pressing need for this Court's review.

Nor is there reason to believe that this case "[a]ffects [l]arge [s]ectors of the [e]conomy." Pet. 29. Independent contractors make up a segment of the workforce that has not changed significantly over time.[22] While petitioner suggests that recent federal financial assistance may lead to greater use of independent contractors, Pet. 29-30, this is mere speculation. If petitioner's predictions come true, and if the frequency of suits by independent contractors

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Court Rewrote the Statute, and Why Congress Did Not Care, 76 Geo. Wash. L. Rev. 522, 535 (2008) (noting only 335 appellate cases even mentioning the Rehabilitation Act from 1973 to 1984, compared with over 900 federal appellate cases mentioning the ADA in 1997 alone).

[22] The percentage of independent contractors in the workforce remained steady within the mid-6% to 7% range, for the fifteen-year period ending in 2005. *See* Bureau of Labor Statistics, Independent Contractors in 2005, *available at* http://www.bls.gov/opub/ted/2005/jul/wk4/art05.htm.

increases dramatically, and if a substantial conflict in the circuits develops, there will be ample opportunity for this Court to intervene.

III. The Ninth Circuit Correctly Held That Section 504 Protects Independent Contractors

The Ninth Circuit's decision is correct. Section 504(a) provides comprehensive protection from discrimination to all qualified individuals with disabilities. As a remedial statute, it is to be construed liberally. Nothing in Section 504(d) requires limiting that protection to employees, and petitioner has not cited a single appellate case so holding.

There is an additional, alternative basis for affirming the court of appeals' decision.[23] It is by no means clear that Section 504(d) even applies to this case, since the complaint does not allege "employment discrimination." Rather, it alleges exclusion from, denial of the benefits of, and discrimination under a covered program or activity. Several of the cases petitioner cites did not even address Section 504(d) in the course of affirming the validity of Section 504 suits by non-employees alleging workplace discrimination.

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[23] Respondent, of course, may argue any ground in support of the judgment below. *Langnes* v. *Green*, 282 U.S. 531, 539 (1931).

A. Section 504(a) Protects All Otherwise Qualified Individuals, Including Independent Contractors, from Discrimination in a Covered Activity or Program

1. Section 504(a) provides that "[n]o otherwise qualified individual with a disability" may be "excluded from the participation in, denied the benefits of, or subjected to discrimination under" any covered program or activity. 29 U.S.C. § 794(a). Section 504(a)'s broad and inclusive language clearly covers Dr. Fleming's allegation that YAMS, a recipient of federal funds, "refused to hire" him based on his disability or perceived disability. 1st Am. Compl. ¶¶ 22, 33, 34, 37, App. 8, 10.

Dr. Fleming qualifies as a "person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities; (ii) has a record of such impairment; or (iii) is regarded as having such an impairment." 29 U.S.C. § 705(20)(B) (2006).[24] The statute specifically spells out exceptions to this definition, and being an independent contractor is not one of them. *See* 29 U.S.C. §§ 705(20)(C), (D), & (E).

Absent Section 504(d), there could be no argument that Dr. Fleming falls outside the statute's protection, and petitioner has not made such

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[24] The current definition of an "individual with a disability" in Section 705(20)(B) incorporates the virtually identical definition in the ADA. *See supra* p. 6 n.5.

an argument.[25] Section 504(d), however, does not define the terms used in Section 504(a); nor does it purport to replace, contradict, or modify the statutory definitions.

More broadly, it is not clear that Section 504(d) even applies to this case. Dr. Fleming does not allege that he has a disability that is an "impediment to employment." Rather, he alleges that he is (or is perceived as) "limited in one or more major life activities including, but not limited to, working, as defined by § 504." 1st Am. Compl. ¶ 22, App. 8. While a central concern of Section 504 was "enhancing employment of the handicapped," Congress added this alternative definition of "individual with a disability" to make clear that "it was intended to prohibit other types of discrimination as well." *Darrone*, 465 U.S. at 632.

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[25] The decision to the contrary in *Wojewski* is wrong. There, the Eighth Circuit jumped from the "similarity between Title I and the Rehabilitation Act" to the conclusion that both "apply to an employee-employer relationship." 450 F.3d at 345. The court ignored a key difference between the statutes, namely, that Title I of the ADA explicitly protects only "employees," whereas Section 504 protects any "otherwise qualified individual with a disability" (subject to the enumerated statutory exceptions). Contrary to the Eighth Circuit's reasoning, applying Section 504(a) to an independent contractor like Dr. Wojewski would not have required the court to "extend" Section 504's "coverage." *Id.* As noted *supra* pp. 21-22, later Eighth Circuit decisions have retreated from *Wojewski*'s unduly narrow reading of Section 504.

In the district court, YAMS repeatedly insisted that its agreement with Dr. Fleming established "no employment relationship" and that an "'employment agreement' does not exist."[26] YAMS now characterizes Dr. Fleming's complaint as one "alleging employment discrimination," but only to bring it under Section 504(d) in order to have it dismissed on the ground that Dr. Fleming is not an "employee" as required by Title I of the ADA.

Petitioner cannot have it both ways. If Dr. Fleming is not an "employee" and petitioner is not an "employer," then the complaint should not be treated as one alleging "employment discrimination" for purposes of Section 504(d). Petitioner agrees that it is "illogical to allow *employment* discrimination claims by independent contractors, who are, by definition, *not* employees." Pet. 32. Petitioner leaps from that premise, however, to the conclusion that Section 504(d) requires the dismissal of Dr. Fleming's suit. The more logical conclusion, and the one consistent with the statute's language and purpose, is that Section 504(d) simply does not apply.

The Justice Department agrees with this analysis. It has taken the position that because Section 504(d) "applies only to 'a complaint alleging

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[26] Reply in Support of Yuma Anesthesia Medical Services' Motion to Dismiss, *Fleming* v. *Yuma Reg'l Med. Ctr.*, No. Civ. 05-3906 (D. Ariz. May 1, 2006), at 4; Memorandum in Support of Yuma Anesthesia Medical Services' Motion to Dismiss (Mar. 6, 2006), at 5.

employment discrimination,'" entities too small to be covered by Title I (like petitioner) nevertheless are subject to suits under Section 504 "by individuals who are not employees (such as patients and independent contractors)." *Schrader* Amicus Br. 11.

2. Based on the breadth of Section 504(a), courts have not limited its protection to employees. Some of the very cases cited by petitioner recognize that an individual can sue a recipient of federal funds for workplace discrimination even if he or she was not employed by that employer, or, for that matter, by any employer. The D.C. Circuit allowed the plaintiff in *Redd* to pursue her Section 504 claims against the Bureau, even though she was not its employee. And the Idaho Supreme Court approved of the trial court's submission to the jury of Dr. Levinger's Section 504(a) claims against the medical center, even though, as an independent contractor of a medical-services group, he was not employed by anyone.

Even a volunteer has been allowed to pursue a Section 504(a) claim against the government based on allegations that she was denied a position with the Peace Corps on account of her disability. *See Mendez* v. *Gearan*, 947 F. Supp. 1364, 1370-71 (N.D. Cal. 1996). Peace Corps volunteers clearly are not employees: a federal statute explicitly states that such volunteers "shall not be deemed . . . employees . . . of . . . the United States for any purpose." 22 U.S.C. § 2504(a) (2006).

3. Petitioner's internally inconsistent position on the applicability of Section 504(d) is incorrect, illogical, and unsupported by authority. To make matters worse, petitioner's contention that Section 504(d) would bar Section 504(a) suits by non-employees would undermine the statute's purpose of affording comprehensive protection against disability discrimination in the workplace. *See infra* Section III.B.

Indeed, petitioner's interpretation turns Section 504(d) into a trap – in effect, the Bermuda Triangle of statutes. If an independent contractor is drawn into its range, he disappears from the Section 504 universe completely, rather than simply being guided back to the safe territory of Section 504(a). This is not what Congress intended in a remedial law designed to protect *all* qualified individuals from disability discrimination in the workplace and beyond.

B. Section 504(d) Does Not Take Away Rights Given by Section 504(a)

Even if Dr. Fleming's complaint is viewed as alleging "employment discrimination," thereby triggering the application of Section 504(d), that provision would not affect or limit the coverage of Section 504(a). Petitioner's argument to the contrary misconstrues both statutory provisions. It contradicts the statutory text and legislative history. It calls other statutory provisions and case law into question. And it defeats some of the purposes of both provisions and leads to incongruous results.

1. Subsection (d) provides that "[t]he *standards* used to determine whether [Section 504] has been *violated* in a complaint alleging employment discrimination under this section shall be the *standards* applied under Title I of the Americans with Disabilities Act . . . ." 29 U.S.C. § 794(d) (emphases added). The usual meaning of "standard" is a "measure or rule applicable in legal cases such as the standard of care in tort actions." *Black's Law Dictionary* 1404 (6th ed. 1990).

Section 504(d) thus refers to standards of liability, not scope of coverage. *See* 587 F.3d at 944, Pet. App. 11a; *Schrader* v. *Ray*, *supra*. "[E]ver since" Congress passed Section 504(d), the lower courts have consistently interpreted and applied it in this manner, "incorporating the ADA's substantive standards for determining whether a covered employer has engaged in illegal discrimination." *Fowler* v. *UPMC Shadyside*, 578 F.3d 203, 208 (3d Cir. 2009).[27]

2. The legislative history of Section 504(d) does not support petitioner's claim that Congress mandated "uniformity and consistency" across all of Title I and Section 504, Pet. 11, 28, 34, or even as to the scope of coverage of the two statutes. Congress simply

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[27] *See also, e.g.*, *Donahue* v. *Consol. Rail Corp.*, 224 F.3d 226, 229 (3d Cir. 2000) ("elements of a claim"); *Gile* v. *United Airlines, Inc.*, 95 F.3d 492, 497 (7th Cir. 1996) ("definition of reasonable accommodation"); *Borkowski* v. *Valley Cent. Sch. Dist.*, 63 F.3d 131, 137 (2d Cir. 1995) (equivalent statutory "obligations").

wanted Section 504(d) to "ensure uniformity and consistency of interpretations," S. Rep. No. 102-357, *supra*, at 7, so that entities covered by both statutes would be governed by the same rules of liability and would know what conduct was prohibited.[28]

Petitioner conveniently omits the explanation by Senator Harkin, the principal sponsor of the 1992 amendment. He explained that under Section 504(d), "those who are covered by title V of the Rehabilitation Act will know that these are the definitions of *reasonable accommodation* and *discrimination* that apply." 138 Cong. Rec. 31,523 (1992) (emphases added). Notably, Senator Harkin did not say there would be any change in "those who are covered." *See also, e.g.*, *Freed* v. *Consolidated Rail Corp.*, 201 F.3d 188, 194 (3d Cir. 2000) (citing "substantive conformity" as the aim of Section 504(d)). In short, Section 504(d) was intended to make the same rulebook apply to "those who are covered" under Section 504 and Title I; it was

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[28] For example, Title I expressly includes reassignment of workers to vacant positions as a possibly required accommodation. 42 U.S.C. § 12111(9)(B). Most courts had held that such reassignment was not required under Section 504. *See Woodman* v. *Runyon*, 132 F.3d 1330, 1339 n.9 (10th Cir. 1997). After the passage of Title I and Section 504(d), courts departed from their pre-1992 decisions and applied the newer ADA standard in cases under both Section 504 and the ADA. *See, e.g., Bratten* v. *SSI Serv., Inc.*, 185 F.3d 625, 633-34 (6th Cir. 1999); *Gile*, 95 F.3d at 497.

not meant to change the roster of Section 504 players.[29]

3. Petitioner's argument also misses the essential point: the most salient distinction between Title I of the ADA and Section 504 is their scope.[30] The two statutes apply essentially the same philosophy and substantive requirements to separate, albeit sometimes overlapping, sets of regulated entities and protected individuals. Congress could not have intended that Section 504(d), enacted with little discussion – and none at all on the scope of coverage – would make the coverage of Section 504 coextensive with that of Title I. This Court would not conclude that Section 504(a) was repealed by implication for certain cases of workplace discrimination unless "the earlier and later statutes [were] irreconcilable" – which is far from the case here. *Morton* v. *Mancari*, 417 U.S. 535, 550 (1974).

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[29] The ADA itself confirms that Title I does not limit the scope of Section 504. Congress directed that "[n]othing in [the ADA] shall be construed to *invalidate* or *limit* the remedies, rights, and procedures of any Federal law . . . that provides greater or equal protection for the rights of individuals with disabilities . . . ." 42 U.S.C. § 12201(b) (emphases added). Construing Section 504(d) to limit who Section 504 protects, because of Title I's purported limitation to "employees," would violate this provision.

[30] *See* Harvey S. Mars, *An Overview of Title I of the Americans With Disabilities Act and Its Impact Upon Federal Labor Law*, 12 Hofstra Lab. L.J. 251, 256-57 (1995).

Petitioner also argues that Title I's limitation to "employees" is "an inextricable element of the standards applied under Title I" and that "there is simply no way to make sense" of Title I's prohibitions "outside [the] context" of "employees" and "employers." Pet. 32-33. But Title I's substantive rules can be applied to "otherwise qualified individuals" as well as "employees." As this case illustrates, an entity covered by Section 504 sometimes refuses to hire, terminates, or otherwise discriminates against an independent contractor just as it would an employee. The standards for judging such conduct can be applied in both situations.

4. If petitioner's argument were accepted, other differences between Section 504 and Title I would be called into question. Petitioner acknowledges several ways in which the statutes differ, Pet. 5-9, and there are others. For example, Section 504 does not limit compensatory damages, but Title I does.[31] Section 504 does not contain Title I's statute of limitations[32] or its requirement of administrative exhaustion.[33] These statutory distinctions belie petitioner's unsupported

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[31] *Compare* 42 U.S.C. § 1981a(b)(3) (2006) *with Roberts* v. *Progressive Independence, Inc.*, 183 F.3d 1215, 1223-24 (10th Cir. 1999) *and Moreno* v. *Consol. Rail Corp.*, 63 F.3d 1404, 1415 (6th Cir. 1995).

[32] *See, e.g., Alberti* v. *City of San Francisco Sheriff's Dep't*, 32 F. Supp. 2d 1164, 1171-72 (N.D. Cal. 1998); *Winfrey* v. *City of Chicago*, 957 F. Supp. 1014, 1018, 1023 (N.D. Ill. 1997).

[33] *See, e.g., Freed*, 201 F.3d at 193-94; *Brennan* v. *King*, 139 F.3d 258, 268 n.12 (1st Cir. 1998).

assertion that "Section 504(d) was meant to eliminate any remaining inconsistencies between the two statutory schemes." Pet. 10. If all of Title I applied to Section 504 under the rubric of "standards," these differences – which Congress presumably chose for a reason – would be extinguished.

5. Finally, petitioner's reading of Section 504 would lead to a most incongruous result. Petitioner could discriminate with impunity against its independent contractor doctors, or those applying for such positions. But, as petitioner acknowledged below, it could not discriminate against other individuals with disabilities, like clients or customers, whose non-employment-discrimination complaints would not trigger Section 504(d).[34] Considering that Section 504(a)'s original, primary purpose was to create equal work opportunities for disabled individuals, this would stand the statute on its head.[35] Petitioner has

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[34] Memorandum in Support of Yuma Anesthesia Medical Services' Motion to Dismiss, *Fleming v. Yuma Reg'l Med. Ctr.*, No. Civ. 05-3906 (D. Ariz. Mar. 6, 2006), at 5.

[35] The logic of petitioner's reading would produce an even stranger result under Section 501, which protects federal government employees from disability discrimination. Section 501(g) contains language virtually identical to that of Section 504(d); it also refers to the "standards" of Title I. *See* 29 U.S.C. § 791(a), (g) (2006). But Title I expressly excludes the United States from its definition of "employer." 42 U.S.C. § 12111(5)(B)(i) (2006). Thus, if Title I dictated Section 501's coverage, Section 501 would have no application whatsoever. Congress could not have intended this absurd result. *See Schrader* Amicus Br., *supra*, at 11-12.

not advanced any reasons why this result would be reasonable, desirable, or what Congress intended.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Dr. Lester Fleming, Plaintiff, vs. Yuma Regional Medical Center; Yuma Anesthesia Medical Services, Defendants.	No. CIV 05-3906 PHX-ROS **PLAINTIFF'S FIRST AMENDED COMPLAINT** (Filed Dec. 20, 2006)

Plaintiff, Dr. Lester Fleming, by and through his attorneys, for his First Amended Complaint, alleges as follows:

1. Dr. Lester Fleming brings this action to recover damages caused by the Yuma Regional Medical Center ("YRMC") and Yuma Anesthesia Medical Services ("YAMS") for violations of Title I of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12101 *et seq.*, Title II of the ADA, 42 U.S.C. §§ 12131 *et seq.*, §504 of the Federal Rehabilitation Act of 1973, as amended (29 U.S.C. § 794) ("Section 504"), the Arizona Employment Protection Act ("AEPA") A.R.S. §23-1501 and the Arizona Civil Rights Act ("ACRA") A.R.S. §§ 41-1401 *et seq.*

2. The Plaintiff, Lester Fleming, M.D., is a citizen of the United States who lives at 2857 Esmerelda Drive, Bullhead City, Arizona 86429. Under §504, Defendants perceived Dr. Fleming as an individual with a physical impairment (as a result of his sickle cell anemia) that substantially limited one or more of his major life activities. At all times during his application for employment with Defendants, Dr. Fleming was able to perform all of the essential functions of his position, with or without reasonable accommodation, and, therefore, was a "qualified individual with a disability" as defined by the ADA and §504.

3. Defendant YRMC is an Arizona medical center located at 2400 S. Avenue A, Yuma, Arizona 85364. YRMC is a "federal fund recipient," as defined by §504. YRMC is an employer within the meaning of each of the statutes cited herein.

4. Defendant YAMS is an Arizona medical service located at 2400 S. Avenue A, Yuma, Arizona 85364. The Defendant is a "federal fund recipient," as defined by §504. YAMS, in conjunction with YRMC, is an employer within the meaning of each of the statutes cited herein.

5. The parties to this action reside in and regularly do business within the jurisdiction of this Court. This Court has jurisdiction under 28 U.S.C. §1331. Venue is proper pursuant to 28 U.S.C. §1391(b)(2).

6. On November 1, 2005, Dr. Fleming also filed a timely charge of disability discrimination with the Civil Rights Division of the Attorney General against Defendants YRMC and YAMS. The Attorney General's office issued a right-to-sue letter on August 29, 2006, and this First Amended Complaint is being filed within 90 days of receipt of that letter.

7. Dr. Fleming is an anesthesiologist. In 1991, Dr. Fleming graduated from the State University of New York at Binghamton with a Bachelor of Arts in English. In 2001, Dr. Fleming graduated with a Doctor of Medicine degree from Medical College of Pennsylvania-Hahnemann School of Medicine. In 2002, Dr. Fleming completed his medical internship at Washington University in St. Louis, Missouri. On August 28, 2005, Dr. Fleming successfully completed his medical residency, specializing in anesthesiology, at The Health Science Center at Brooklyn, New York.

8. Dr. Fleming suffers from sickle cell anemia. Sickle cell anemia is a disease involving abnormally shaped red blood cells, which then have difficulty circulating properly through the body. Sickle cell anemia is an inherited disease in which the red blood cells, normally disc-shaped, become crescent-shaped. As a result, they function abnormally and cause small blood clots. Individuals are most often well, but their lives are punctuated by periodic painful attacks. Sickle cell anemia affects African-Americans almost exclusively.

9. Despite having sickle cell anemia, Dr. Fleming has successfully completed competitive academic programs and rigorous professional programs. Throughout Dr. Fleming's medical residency, he had worked similar rigorous schedules as the other residents without any accommodation for his disability. Dr. Fleming never requested, nor sought from either Defendant, any accommodation to his anticipated work schedule.

10. In April 2005, Dr. Fleming applied for an anesthesiologist position with Yuma Regional Medical Center ("YRMC") and was interviewed by Yuma Anesthesia Medical Services ("YAMS").

11. In May 2005, YRMC and YAMS offered Dr. Fleming a position as an anesthesiologist. Soon after, YAMS and YRMC and Dr. Fleming executed an employment contract. Under that agreement, Dr. Fleming's stated annual salary with YRMC and YAMS was to be $360,000. In July 2005, YRMC

facilitated Dr. Fleming's search for housing in Arizona by paying for his travel to Yuma and hiring a moving company to move his furniture. Dr. Fleming was scheduled to move to Yuma on September 12, 2005, and to start working for YRMC and YAMS on October 3, 2005.

12. On August 28, 2005, Dr. Raj Khona, a YAMS partner, called and left a voice mail message informing Dr. Fleming that his scheduled move to Arizona was cancelled because of a "problem with his credentialing." Credentialing is a time-intensive process where hospitals gather all of the academic and professional information about the physicians they have hired. A hospital must credential a physician before he or she is allowed to work in its facilities.

13. On August 29, 2005, Dr. Fleming called Dr. Khona for clarification and to learn if there were any other issues besides his credentialing. Dr. Khona replied that he was not in a position to elaborate.

14. On August 30, 2005, Dr. R. Watson, YAMS's Acting Chairman, called on behalf of the other YAMS partners to clarify the credentialing process. Dr. Watson told Dr. Fleming that "red flags were raised after we received your Residency Director's letter . . . the hospital is in the process of contacting your hematologist/oncologist." During this conversation, Dr. Watson recommended that Dr. Fleming seek alternative employment because his credentialing could not be guaranteed.

15. On September 1, 2005, Dr. Fleming met with Dr. David Diuguid, his hematologist/oncologist, regarding his employment with YRMC and YAMS. Dr. Diuguid told Dr. Fleming that YRMC had sent him a letter asking that he confirm a statement made by The Health Science Center at Brooklyn's Residency Director, Dr. Audree Bendo. On information and belief, Dr. Bendo had sent a letter to YAMS explaining that Dr. Fleming had sickle cell anemia.

16. On September 29, 2005, Dr. Fleming participated in a conference call with YRMC and YAMS's Drs. Patel, Khona, and Rojas. During this conversation, they interrogated Dr. Fleming about his health and questioned his ability to work in their medical practice. They explained that physicians in their practice sometimes worked schedules of up to 36 hours straight. Dr. Fleming responded that, during his residency, he worked similar hours without ever requesting an accommodation. Dr. Patel responded that she did not care about Dr. Fleming's previous schedule; she only cared about what would happen if he worked for YAMS and YRMC. At one point during the conversation on September 29th, Dr. Khona stated that if Dr. Fleming was scheduled to work and got sick he should not expect any help. Dr. Khona also said, "I don't know of any insurance company that would insure you once they know that you have sickle cell anemia. Did you think about that? . . . Why didn't you tell us that you had sickle cell anemia?"

17. During the conference call on September 29th, Drs. Patel, Khona, and Rojas told Dr. Fleming

that he would need to sign an addendum to his employment contract if he still wanted to work for them. Dr. Khona would not give specific details about the addendum other than telling him that Dr. Fleming would be responsible for his own cases and calls. They asked if he would agree to sign it; Dr. Fleming said that he would need to see it first. Drs. Patel, Khona, and Rojas agreed to forward the addendum to Dr. Fleming.

18. Defendants YAMS and YRMC have assumed that Dr. Fleming will not be able to obtain insurance because of his sickle cell anemia. Defendants have also assumed that Dr. Fleming would not be able to work a normal work schedule because he has sickle cell anemia.

19. YAMS and YRMC sent the addendum to Dr. Fleming on November 4, 2005, five weeks after he was originally scheduled to start working. Between October 3 and November 4, 2005, Dr. Fleming had called repeatedly in an attempt to obtain a copy of the addendum. The Defendants told Dr. Fleming that their lawyers were "working on it."

20. Amongst other adverse changes to the original employment contract, the addendum provided that he could only work for YRMC and YAMS if he agreed that it would not be possible to provide him a reasonable accommodation for his operating room and call schedules.

21. It is long past the date that Dr. Fleming was scheduled to start working for YAMS and YRMC.

However, they refused to allow him to work unless and until he agreed to sign the addendum to his employment agreement.

22. Defendants YRMC and YAMS perceived Dr. Fleming as being substantially limited in one or more major life activities including, but not limited to, working, as defined by §504.

23. The Defendants' actions set forth in this Complaint, including the actions of its management employees, were intentional and willful.

24. At all relevant times, Dr. Fleming was qualified to perform the essential functions required of an anesthesiologist, with or without a reasonable accommodation.

25. As a result of the Defendants' actions, Dr. Fleming has suffered damages, including, but not limited to, the loss of wages and benefits, loss of professional opportunities, and emotional distress and mental pain and anguish.

FIRST CLAIM FOR RELIEF

YRMC Refused to Credential and/or Terminated Dr. Fleming Based on a Perceived Disability in Violation of the Rehabilitation Act

26. Paragraphs 1-25 are incorporated by reference the same as if fully pleaded herein.

27. YRMC is a covered entity that receives federal funding, and is prohibited from discriminating against "qualified individuals" with disabilities.

28. Defendant YRMC learned that Dr. Fleming had sickle cell disease and subsequently refused to allow him to start working on October 3, 2005. Then, on November 4, 2005, Defendant would only allow Dr. Fleming to work if he agreed that YRMC would not have to provide him with a reasonable accommodation in his schedule.

29. Defendant YRMC refused to credential or employ Dr. Fleming.

30. Dr. Fleming has suffered damages as a result of YRMC's unlawful acts, including past and future lost wages and benefits, severe emotional trauma, and the costs of bringing this action, including attorneys' fees.

SECOND CLAIM FOR RELIEF

YAMS Refused to Hire and/or Terminated Dr. Fleming Based on a Perceived Disability in Violation of the Rehabilitation Act

31. Paragraphs 1-30 are incorporated by reference the same as if fully pleaded herein.

32. YAMS is a covered entity that receives federal funding, and is prohibited from discriminating against "qualified individuals" with disabilities.

33. Defendant YAMS learned that Dr. Fleming had sickle cell disease and subsequently refused to allow him to start working on October 3, 2005. Then, on November 4, 2005, Defendant would only allow Dr. Fleming to work if he agreed that it would not have to provide him with a reasonable accommodation.

34. Defendant YAMS refused to hire Dr. Fleming.

35. Dr. Fleming has suffered damages as a result of YAMS's unlawful acts, including past and future lost wages and benefits, severe emotional trauma, and the costs of bringing this action, including attorneys' fees.

THIRD CLAIM FOR RELIEF

YAMS Refused to Hire and/or Terminated Dr. Fleming Because of his Perceived Disability in Violation of Title I of the ADA

36. Paragraphs 1-35 are incorporated by reference the same as if fully pleaded herein.

37. YAMS violated Title I of the ADA, 42 U.S.C § 12101 *et seq.* by refusing to hire and/or terminating Dr. Fleming because of his perceived disability.

38. Dr. Fleming has suffered damages as a result of YRMC's unlawful acts, including past and future lost wages and benefits, severe emotional

trauma, and the costs of bringing this action, including attorneys' fees.

FOURTH CLAIM FOR RELIEF

Defendants Refused to Hire and/or Terminated Dr. Fleming Because of his Perceived Disability in Violation of Title [sic] **of the ADA.**

39. Paragraphs 1-38 are incorporated by reference the same as if fully pleaded herein.

40. Defendants violated Title I of the ADA, 42 U.S.C § 12101 *et seq.* by refusing to hire and/or credential Dr. Fleming because of his disability.

41. Dr. Fleming has suffered damages as a result of Defendants' unlawful acts, including past and future lost wages and benefits, severe emotional trauma, and the costs of bringing this action, including attorneys' fees.

FIFTH CLAIM FOR RELIEF

Defendants Refused to Credential and/or Terminated Dr. Fleming Because of his Perceived Disability in Violation of Title II of the ADA

42. Paragraphs 1-41 are incorporated by reference the same as if fully pleaded herein.

43. Defendants violated Title II of the ADA, 42 U.S.C § 12131 *et seq.* by refusing to credential and/or discharging Dr. Fleming because of his disability.

44. Dr. Fleming has suffered damages as a result of Defendants' unlawful acts, including past and future lost wages and benefits, severe emotional trauma, and the costs of bringing this action, including attorneys' fees.

SIXTH CLAIM FOR RELIEF

Defendants Breached the Employment Contract in Violation of the Arizona Employment Protection Act.

45. Paragraphs 1-44 are incorporated by reference the same as if fully pleaded herein.

46. The AEPA prohibits an employer from wrongfully refusing to hire and/or discharging an employee where the employer and employee signed a written contract for a specified duration of time and the employee was terminated prior to the expiration of such period. A.R.S. § 23-1501(1).

47. Defendants' refusal to allow Dr. Fleming to start working on October 3, 2005, was a breach of the employment contract in violation of the AEPA.

48. Dr. Fleming has suffered damages as a result of Defendants' unlawful acts, including past and future lost wages and benefits, severe emotional trauma, and the costs of bringing this action, including attorneys' fees.

SEVENTH CLAIM FOR RELIEF

Defendants' Refusal to Hire and/or Terminated Dr. Fleming Because of his Disability in Violation of the ACRA

49. Paragraphs 1-48 are incorporated by reference the same as if fully pleaded herein.

50. Defendants violated the ACRA, A.R.S. § 41-1401 *et seq.* by refusing to hire and/or discharging Dr. Fleming because of his disability.

51. Dr. Fleming filed a Charge of Discrimination with the Arizona Attorney General's Civil Rights Division in timely fashion. On September 8, 2006 that Division mailed a Notice of Right to Sue (dated August 29, 2006) to Dr. Fleming. This action is brought within 90 days of receipt of that Notice.

52. Dr. Fleming has suffered damages as a result of Defendants' unlawful acts, including past and future lost wages and benefits, severe emotional trauma, and the costs of bringing this action, including attorneys' fees.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court:

A. Accept jurisdiction over this action;

B. Order the Defendants jointly and severally to compensate the Plaintiff for his past and future loss of wages and benefits, plus interest;

C. Enter judgment in favor of the Plaintiff for such amount as may be awarded by a jury for compensatory damages for his physical and emotional suffering and loss of enjoyment of life;

D. Enter judgment in favor of the Plaintiff for such mount [sic] as may be awarded for punitive damages;

E. Reinstate the Plaintiff to his former position or, in lieu of reinstatement, award him front pay (including benefits);

F. Award to the Plaintiff all costs and reasonable attorneys' fees incurred in connection with this action;

G. Grant such additional or alternative relief as may appear to the court to be just and equitable.

RESPECTFULLY SUBMITTED this 20th day of December, 2006.

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of December, 2006, I electronically transmitted the attached Plaintiff's First Amended Complaint to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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I hereby certify that on the 20th day of December, 2006, I served the attached First Amended Complaint by mail on the following, who are not registered participants in the CM/ECF System, or requested a paper copy:

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s/ Lyn Caglio

Supreme Court, U.S.
FILED
JUN 1 - 2010
OFFICE OF THE CLERK

No. 09-1146

In the Supreme Court of the United States

YUMA ANESTHESIA MEDICAL SERVICES LLC,

Petitioner,

v.

LESTER FLEMING,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR PETITIONER

Respondent's opposition rests on the mistaken premise that the question in this case is whether independent contractors are barred from asserting any claims at all under Section 504 of the Rehabilitation Act. But there is no dispute that independent contractors may assert claims under Section 504.

The question here is whether Section 504 allows independent contractors to assert *employment discrimination* claims in particular—a discrete subset of claims governed by the more plaintiff-friendly standards of Title I of the Americans with Disabilities Act (ADA).

The Ninth Circuit's holding that entities using independent contactors (and other entities that do not qualify as "employer[s]" under Title I of the ADA) are subject to employment discrimination claims governed by the standards of Title I means not just that those entities may be sued in private actions in which plaintiffs bear a reduced burden. More importantly, it means that such entities are required to provide disabled individuals a wide range of potentially costly and burdensome accommodations *not* previously required by Section 504 outside the employer-employee context.

Respondent's attempt to diminish the conflict among the lower courts with respect to this important question are unavailing: there is no doubt that if this case had arisen in the Sixth, Eighth, or D.C. Circuits, or in Idaho state court, the dismissal of respondent's claim would have been affirmed. Nor is there any doubt that the Tenth Circuit, by contrast, would have reached the same result as the court below.

Given the large number of independent contactors, and the potential impact of this issue on the primary conduct of entities throughout the Nation, there can be no doubt that the issue is sufficiently important to warrant this Court's attention. Because the relevant facts are uncontested, this case provides an ideal vehicle for this Court resolve the issue.

I. THIS CASE SQUARELY PRESENTS THE QUESTION WHETHER INDEPENDENT CONTRACTORS MAY ASSERT EMPLOYMENT DISCRIMINATION CLAIMS UNDER SECTION 504.

Respondent suggests (Opp. 27) that the question presented in the petition is not properly before the Court in this case because, supposedly, he has not brought an employment discrimination claim. That suggestion is wrong.

Respondent's complaint alleges that he and petitioner had "executed an employment contract" and that he "suffered damages * * * including past and future lost wages" when petitioner ultimately "refused to hire" him. 1st Am. Compl. ¶¶ 11, 34, 35 (Opp. App. 4, 10). Those are the allegations of an employment discrimination claim. Indeed, when resisting petitioner's motion to dismiss, respondent consistently referred to his complaint as asserting "employment discrimination claims." See, *e.g.*, Resp. to Mot. to Dismiss (Dkt. No. 16), at 3, 7, 10, *Fleming* v. *Yuma Reg'l Med. Ctr.*, No. 2:05-cv-3906 (D. Ariz. Apr. 5, 2006).

Had respondent elected to do so, he could have brought a different claim under the Rehabilitation Act. Rather than allege employment discrimination, respondent could have alleged that petitioner "ex-

cluded" him from "participation in" a federally funded program "solely by reason of' his alleged disability. 29 U.S.C. § 794(a). Meritorious or not, such a complaint would have stated a claim under the Rehabilitation Act—a claim not alleging employment discrimination, and thus not triggering Section 504(d). But, as the Ninth Circuit recognized below, the complaint respondent actually filed was "for breach of his employment contract and employment discrimination." Pet. App. 3a.

Indeed, it is precisely because respondent's complaint alleges employment discrimination that the Ninth Circuit had to "decide whether § 504(d), which refers to 'the standards applied under Title I of the Americans with Disabilities Act * * * as such sections relate to employment,'" limits employment discrimination claims under Section 504 to those claims that are cognizable under Title I or instead permits anyone eligible to sue under Section 504 to "bring an employment discrimination claim based on the standards found in the ADA." Pet. App. 1a, 2a. By its very terms, Section 504(d) applies only to "complaint[s] alleging employment discrimination." If respondent's complaint had not alleged employment discrimination, the Ninth Circuit would have had no occasion to address the extent to which Section 504(d) incorporates Title I of the ADA.

Respondent contends that our interpretation "turns Section 504(d) into * * * the Bermuda Triangle of statutes," causing independent contractors to "disappear[] from the Section 504 universe completely." Opp. 32. But that is incorrect. Independent contractors may bring claims under Section 504. The question—presented in the petition and expressly addressed by the Ninth Circuit below—is whether

they may assert *employment discrimination* claims in particular.

Section 504 of the Rehabilitation Act expressly distinguishes employment discrimination claims from other claims. Claims brought under Section 504 are generally subject to stringent causation and *mens rea* standards. Pet. 5–6. A plaintiff typically must prove that the alleged discrimination occurred "solely by reason of" the plaintiff's alleged disability (29 U.S.C. § 794(a)), and that the defendant acted with "a *mens rea* of intentional discrimination." *Mark H.* v. *Lemahieu*, 513 F.3d 922, 938 (9th Cir. 2008) (internal quotation marks omitted).

But employment discrimination claims brought under Section 504 are—by virtue of Section 504(d)—subject to the more lenient standards of Title I of the ADA, which allow a plaintiff to prevail even if his disability was only one "motivating factor" among many for the defendant's conduct (*Martin* v. *Cal. Dep't of Veterans Affairs*, 560 F.3d 1042, 1048 (9th Cir. 2009)), and even if the defendant had no discriminatory intent. See Pet. 7–8 (citing *inter alia* 42 U.S.C. § 12112(b)(3); *Raytheon Co.* v. *Hernandez*, 540 U.S. 44, 52–53 (2003)).

Thus, whether a particular class of plaintiffs may assert *employment discrimination* claims, as opposed to other claims under the Rehabilitation Act, has considerable practical significance.

II. THE LOWER COURTS ARE DIVIDED OVER WHETHER SECTION 504(d) INCORPORATES THE LIMITATIONS ON EMPLOYMENT DISCRIMINATION CLAIMS FOUND IN TITLE I OF THE ADA.

As we explained in the petition (Pet. 17–24), and as the Ninth Circuit expressly acknowledged (Pet. App. 14a), the decision below deepens a clear division among the lower courts over whether Section 504(d) incorporates the limitations on employment discrimination claims found in Title I of the ADA.

Respondent strives mightily to invent distinctions between the decision below and those that conflict with it, but there can be no doubt that the question presented would be answered differently in different circuits. That lack of uniformity should be resolved by this Court.

Respondent acknowledges that the decision below "conflicts with * * * the Eighth Circuit's decision in *Wojewski*." Opp. 20. But, citing *Lewis* v. *Johanns*, 180 F. App'x 599 (8th Cir. 2006), respondent suggests that the Eighth Circuit will likely reconsider *Wojewski* and adopt "an understanding consistent with the Ninth Circuit's in this case." Opp. 21–22. There is, however, no merit to respondent's suggestion. Not only is *Lewis* an unpublished decision that pre-dates *Wojewski*, but it specifically states that "the same basic standards *and definitions* are used under the ADA and the Rehabilitation Act" (180 F. App'x at 601 (emphasis added)), a view that is consistent with *Wojewski* and contrary to the decision below.

Respondent asserts that *Levinger* is "factually distinguishable" and "does not conflict with the deci-

sion below." Opp. 17, 19. Neither assertion is correct. Respondent notes that the *Levinger* plaintiff provided his services to the defendant hospital under a contract between the hospital and a third-party service provider, rather than pursuant to a contract directly with the hospital, but that distinction is wholly immaterial. The plaintiff indisputably was an independent contractor rather than an employee. Indeed, the plaintiff's independent contractor status was the very basis for the court's conclusion, in direct conflict with the decision below, that "[c]onsequently, [plaintiff] does not have any employment discrimination rights under the ADA or the Rehabilitation Act." *Levinger* v. *Mercy Med. Ctr.*, 75 P.3d 1202, 1208 (Idaho 2003). Thus, far from being mere "dictum" as respondent claims (Opp. 19 n.17), the court's statement that the plaintiff "cannot * * * proceed with his employment discrimination claim * * * *since he is an independent contractor*" (75 P.3d at 1206 (emphasis added)) is essential to the court's opinion and the distinction it draws between employment discrimination claims and all other claims under the Rehabilitation Act. As the court recognized, plaintiff's "status as an independent contractor" prevents him from bringing an employment discrimination claim but "does not preclude Rehabilitation Act * * * claims for other than employment discrimination." *Ibid.*

That distinction between employment discrimination claims and other Section 504 claims, which the decision below failed to recognize, also lies at the heart of *Redd*. As explained in the petition (at 22–23), *Redd* held than an individual who provided services as an independent contractor could *not* maintain an employment discrimination claim under the Rehabilitation Act even though the same individual *could* bring a claim against the same defendant for

having been "unlawfully denied participation" in a federally funded program. *Redd* v. *Summers*, 232 F.3d 933, 936, 941 (D.C. Cir. 2000).[1] Thus, contrary to respondent's assertion (Opp. 18), *Redd* is *not* "in accord with the Ninth Circuit's decision in this case" but rather squarely conflicts with the decision below.

Respondent is also mistaken when he says that "there is no tension" (Opp. 15) between *Hiler* and the decision below. *Hiler* rests on the Sixth Circuit's conclusion that "individuals who do not otherwise meet the statutory definition of 'employer' cannot be held liable under the Rehabilitation Act" for employment discrimination. *Hiler* v. *Brown*, 177 F.3d 542, 547 (6th Cir. 1999). As the Ninth Circuit expressly recognized, that holding is "in conflict with" its decision in this case. Pet. App. 14a–15a.

According to respondent, the decision in *Schrader*, although "consistent with the Ninth Circuit's opinion in this case" (Opp. 15), is not implicated by the question presented here because "[t]he Tenth Circuit did not have before it * * * the question of an independent contractor's rights * * * under Section 504." *Ibid.* But that contention, while technically true, ignores the shared analytic foundation underlying both *Schrader* and the decision below. As we explained (Pet. 18–19), *Schrader* held that an individual who could not have brought an employment discrimina-

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[1] As we explained (Pet. 22 & n.7), *Redd* considered the employment discrimination claim under Section 501 rather than Section 504 because the defendant was a government agency rather than a recipient of government funds. But because Section 501(g) is materially indistinguishable from Section 504(d), there is no basis for respondent's speculation (Opp. 18) that the D.C. Circuit would reach a different result under Section 504.

tion claim under Title I of the ADA could bring such a claim under the Rehabilitation Act because, in the court's view, Section 504(d) incorporates only "the substantive standards for determining *what* conduct violates the Rehabilitation Act, not the definition of *who* is covered under the Rehabilitation Act." *Schrader* v. *Ray*, 296 F.3d 968, 972 (10th Cir. 2002). If respondent had filed his case in the Tenth Circuit, the holding in *Schrader* would have compelled the same result that the Ninth Circuit reached here, as the Tenth Circuit itself made clear by explicitly recognizing the conflict between its ruling and the Sixth Circuit's decision in *Hiler*. *Schrader*, 296 F.3d at 974.

The existence of this clear, deep divide among the lower courts is not only demonstrated by the lower courts' own recognition of their disagreement and by those courts' diametrically opposed constructions of the statute—the conflict also has been recognized by respondent's own counsel. Shortly after the decision below, respondent's counsel stated that "[c]ourts around the country have disagreed about the relationship between Title I of the ADA and Section 504 of the Rehabilitation Act," and that disagreement "on the issue makes the case ripe for review by the U.S. Supreme Court." Press Release, *Independent Contractors Protected Under Section 504 of the Rehabilitation Act*, PRWeb.com ("Press Release"), available at http://www.prweb.com/releases/2009/11/prweb3244414.htm. And two weeks after YAMS filed the instant petition, respondent's counsel, writing in an ABA publication, acknowledged that the decision below "adds to a split in the Circuits" over "whether Section 504(d) * * * incorporated only select portions of Title I * * * or whether it incorporated Title I in its entirety," with "the Ninth and Tenth Circuits pitted

against the Sixth and Eighth Circuits." Seth M. Marnin, *Circuits Split Over Whether Independent Contractors Protected Under Section 504 of the Rehabilitation Act*, ABA Section of Labor and Employment Law Flash, available at http://www.abanet.org/labor/flash/10/04/special-feature.shtml.

This well-established conflict among the lower courts calls out for this Court's intervention in order to provide nationwide uniformity in the construction of this important federal statute.

III. THE QUESTION PRESENTED IS IMPORTANT.

Respondent contends that review is unwarranted because, supposedly, "the decision below will affect few people other than the present litigants." Opp. 1. That assessment is incorrect.

First, the division among the lower courts over the proper interpretation of Section 504(d) is important because it means that recipients of federal funding must shoulder significantly different obligations under the Rehabilitation Act depending on their location alone. See Pet. 25. In the Ninth and Tenth Circuits, recipients of federal funds owe independent contractors all of the duties imposed by Title I of ADA, including the obligation to provide "reasonable accommodations" (42 U.S.C. § 12112(b)(5)(A)). In the Sixth, Eighth, and D.C. Circuits, by contrast, recipients of federal funds need not provide such accommodations. Recipients of federal funds located elsewhere cannot be certain of their statutory obligations.

Respondent accuses us of "inflat[ing] the apparent importance of this case" by purportedly "ask[ing] this Court to 'define the obligations that recipients of

federal funds owe disabled individuals,'" an issue that respondent says is "not encompassed by the question presented and * * * not properly before this Court." Opp. 24 (quoting Pet. 1). But respondent misses the point: the decision below has significant real-world consequences because it requires all recipients of federal funds to provide "reasonable accommodations" (42 U.S.C. § 12112(b)(5)(A)) to all independent contractors. That imposes a significant burden wholly apart from any claims asserted in litigation—a law-abiding recipient of federal funds will have to adjust its behavior to fulfill this, and other, new Title I obligations.

Moreover, the Ninth Circuit's decision will likely lead to increased assertions of employment discrimination claims by independent contractors under the Rehabilitation Act, both because recipients of federal funds within the Ninth Circuit will "be liable for failing to provide independent contractors with reasonable accommodations" (Press Release, *supra*) and because independent contractors will be able to invoke the more lenient standards of Title I of the ADA rather than the stringent standards that generally apply to Rehabilitation Act claims. Given the large number of independent contractors in the United States, the additional litigation burden could well be substantial.[2]

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[2] Respondent's observation that the percentage of independent contractors in the Nation's ever-growing workforce "has not changed significantly over time" (Opp. 26) misses the point. First, even if there were a "steady" percentage of the overall workforce (Opp. 26 n.22), the absolute number of independent contractors is large and growing, as respondent's counsel has admitted. Second, our argument is not that the total number of independent contractors is necessarily growing, but that the

Respondent's counsel has recognized the practical importance of the question presented. Noting that there were "an estimated 10.3 million independent contractors" as of 2005, respondent's counsel described the opinion below as a "far-reaching" and "particularly important" decision that will "alter the terrain for thousands of individuals." Press Release, *supra*.

The broad ramifications of the decision below merit this Court's attention.

IV. THE NINTH CIRCUIT ERRED.

Respondent argues that the petition should be denied because the decision below is correct. Opp. 27–38. But the Ninth Circuit's ruling contravenes the language and purpose of Section 504(d) by applying different standards to employment discrimination claims brought under the Rehabilitation Act and those brought under the ADA. Because the decision below flouts congressional intent, the petition should be granted.

1. Disavowing the Ninth Circuit's reasoning, respondent first argues (Opp. 30) that "Section 504(d) simply does not apply" here because, as an independent contractor, he is by definition incapable of bringing an employment discrimination claim. He also posits (Opp. 32) that we propose to "bar Section 504(a) suits by non-employees." But, as discussed above (at 2–3), neither assertion is true. First, respondent *did* bring an employment discrimination claim. Second, we do *not* contend that non-employees

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number of independent contractors *covered by the Rehabilitation Act* is increasing as the federal government distributes funds to an increasing number of entities to combat the current recession. See Pet. 29–30.

may not sue under Section 504. Our point is that they cannot bring *employment discrimination* claims.

2. In the alternative, respondent contends that the Ninth Circuit correctly understood Section 504(d) to incorporate the "standards of liability" of Title I of the ADA, but not its provisions regarding the "scope of coverage." Opp. 33. Yet, as the petition explains (at 32–33), Title I's anti-discrimination "standard" cannot reasonably be separated from the definitions of "qualified individual" and "employer" that it incorporates—and these allow employment discrimination claims to be brought only against "an employer" (42 U.S.C. § 12111(2)) by a person holding or seeking an "employment position" (*id.* § 12111(8)).

Moreover, Title I's requirement that the plaintiff be (or be seeking to become) an employee is undoubtedly "substantive." Opp. 36. The ADA's anti-discrimination regime was designed with the employment relationship in mind; it was never intended to be applied to non-employment relationships. It is for this reason Congress incorporated the "employee-employer" requirement within the ADA's core provisions. Under the ADA, employees of entities with 15 or more employees may bring employment discrimination claims, but independent contractors retained by such entities may not. Respondent offers no explanation why Congress—which adopted Section 504(d) "to ensure uniformity and consistency of interpretations" between the ADA and the Rehabilitation Act (S. Rep. No. 102-357, at 71 (1992))—would have wanted to treat independent contractors differently under the Rehabilitation Act.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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